(Slip Op. 02–56)

YANTAI ORIENTAL JUICE CO., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COLOMA FROZEN FOODS, INC., ET AL., DEFENDANT-INTERVENORS

Court No. 00–07–00309

[Antidumping determination remanded.]

(Decided June 18, 2002)

Grunfeld, Desiderio, Lebowitz, & Silverman L.L.P. (Bruce M. Mitchell, Jeffrey S. Grimson and *Mark E. Pardo),* for Plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau,* Commercial Litigation Branch, Civil Division, United States Department of Justice; *Scott D. McBride,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

The Law Firm of C. Michael Hathaway (C. Michael Hathaway), for Defendant-Intervenors.

EATON, *Judge:* This case is before the court on the motion of Yantai Oriental Juice Co., ("Yantai Oriental"), Qingdao Nannan Foods Co. ("Nannan"), Sanmenxia Lakeside Fruit Juice Co., Ltd. ("Lakeside Fruit Juice"), Shaanxi Haisheng Fresh Fruit Juice Co. ("Haisheng"), Shandong Zhonglu Juice Group Co. ("Zhonglu"), Xianyang Fuan Juice Co., Ltd. ("Fuan"), Xian Asia Qin Fruit Co., Ltd. ("Asia"), Changsha Industrial Products & Minerals Import & Export Corp. ("Changsha Industrial"), and Shandong Foodstuffs Import & Export Corp. ("Shandong Foodstuffs") (collectively "Plaintiffs") for judgment upon the agency record pursuant to USCIT R. 56.2. By their motion, Plaintiffs contest certain aspects of the Department of Commerce's ("Commerce") determination resulting from its antidumping investigation of non-frozen apple juice concentrate ("AJC") from the People's Republic of China ("PRC"), *see Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate From the P.R.C.,* 65 Fed. Reg. 19,873 (Apr. 13, 2000) *("Final Determination"), amended by*

Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Non-Frozen Apple Juice Concentrate From the P.R.C., 65 Fed. Reg. 35,606 (June 5, 2000) *("Amended Final Determination"),* covering the period of investigation ("POR") October 1, 1998, through March 31, 1999. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2000). For the reasons stated below, the court remands this matter to Commerce for further proceedings in conformity with this opinion.

BACKGROUND

Commerce initiated its investigation of AJC production from the PRC in June 1999, in response to a petition filed by several domestic manufacturers, all of which are defendant-intervenors herein.[1] As in previous investigations, Commerce treated the PRC as a nonmarket economy country. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate From the P.R.C.,* 64 Fed. Reg. 65,675, 65,677 (Nov. 23, 1999) *("Preliminary Determination"), amended by Non-Frozen Apple Juice Concentrate From the P.R.C.: Notice of Amended Preliminary Determination, Postponement of Final Determination and Extension of Provisional Measures,* 64 Fed. Reg. 72,316 (Dec. 27, 1999) *("Amended Preliminary Determination").*

Commerce issued its preliminary affirmative determination of sales at less than fair value in November 1999. Thereafter, Plaintiffs[2] objected that Commerce had committed several ministerial errors within the meaning of 19 C.F.R. § 351.224(f), in its calculation of: (1) overhead; and selling, general, and administrative expense ratios for all respondents; and (2) ocean freight value for respondent Lakeside Fruit Juice. *See Amended Preliminary Determination,* 64 Fed. Reg. at 72,317. After considering Plaintiffs' objections Commerce concluded that, while it did indeed make certain ministerial errors, only the errors with respect to Lakeside Fruit Juice were significant within the meaning of 19 C.F.R. § 351.224(g) and, hence, only those errors required correction. *See id.* As a result, Commerce sought to correct those errors, amended its preliminary determination, and changed the deposit rate assessed on Lakeside Fruit Juice's merchandise.

Commerce published the *Final Determination* on April 13, 2000. On April 24, 2000 Plaintiffs alleged ministerial errors in Commerce's final margin calculations. Commerce determined that a ministerial error had been made in calculating the international freight surrogate value and revised the final weighted-average dumping margins accordingly. *See Amended Final Determination,* 65 Fed. Reg. at 35,606. Following publi-

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[1] The defendant-intervenors are Coloma Frozen Foods, Inc., Green Valley Packers, Krouse Foods Cooperative, Inc., Mason County Fruit Packers Co-Op., Inc., and Tree Top, Inc. (collectively "Defendant-Intervenors").

[2] Nine of the 11 respondents in the investigation conducted by Commerce are plaintiffs in this action. Each of these plaintiffs alleged that Commerce made ministerial errors. *See Amended Preliminary Determination,* 64 Fed. Reg. at 72,317.

cation of the *Amended Final Determination,* and of the United States International Trade Commission's affirmative determination that an industry in the United States was threatened by material injury by reason of imports of AJC, an antidumping duty order was entered giving each respondent a separate antidumping duty margin.[3] *See Final Determination,* 65 Fed. Reg. at 19,873. Thereafter, Plaintiffs commenced this action.

DISCUSSION

By their motion, Plaintiffs challenge the following aspects of the *Final Determination:* (1) Commerce's selection of various surrogate factors of production including (A) Commerce's selection of India as the surrogate country for the PRC, (B) Commerce's selection of Indian prices to value juice apples, (C) Commerce's valuation of ocean freight expenses, (D) Commerce's valuation of steam coal, (E) Commerce's valuation of selling, general, and administrative expenses; and factory overhead, and (F) Commerce's inclusion of Detroit freight costs in its east coast surrogate freight calculation; and (2) Commerce's failure to amend ministerial errors contained in the *Preliminary Determination. (See* Pls.' Mem. Supp. Mot. J. Agency R. ("Pls.' Mem.").)

In order for the court to sustain the *Final Determination* it must find that the conclusions contained therein are supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(I). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison v. United States,* 305 U.S. 197, 229 (1938); *Daewoo Elecs. Ltd. v. United States,* 6 F.3d 1511, 1520 (Fed. Cir. 1993) (quoting *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 932 (Fed. Cir. 1984). In reviewing an agency's findings the court must determine "whether the evidence and reasonable inferences from the record support the [agency's] finding." *Daewoo,* 6 F.3d at 1520 (quoting *Matsushita,* 750 F.2d at 933). "The question is whether the record adequately supports the decision of the [agency], not whether some other inference could reasonably have been drawn." *Id.* Finally, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966); *Daewoo,* 6 F.3d at 1520 (quoting *Matsushita,* 750 F.2d at 933). However, "[C]ommerce must articulate a 'rational connection between the facts found and the choice made.'" *Rhodia, Inc. v. United States,* 25 CIT ____, ____, 185 F. Supp. 2d, 1343, 1348 (2001) (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962), and remanding for reconsideration Commerce's calculation of normal value using surrogate overhead costs where Commerce had not explained its reasons for

[3] Commerce directed the United States Customs Service to revise the final weighted-average dumping margins as follows: Yantai Oriental, 9.96 percent; Nannan, 25.55 percent; Lakeside Fruit Juice, 27.57 percent; Haisheng, 12.03 percent; Zhonglu, 8.98 percent; Fuan,14.88 percent; Changsha Industrial, 14.88 percent; Shandong Foodstuffs, 14.88 percent; Asia, 14.88 percent. *See Amended Final Determination,* 65 Fed. Reg. at 35,606.

finding PRC aspirin producers to be more integrated than Indian surrogates).

I. Factors of Production

To determine whether subject merchandise is being, or is likely to be, sold in the United States at less than fair value, Commerce must make "a fair comparison * * * between the export price or constructed export price and normal value."[4] 19 U.S.C. § 1677b(a) (1994); 19 C.F.R. § 351.401(a) (1998). Where, as here, the subject merchandise is exported from a nonmarket economy country ("NME"),[5] Commerce is directed by statute to calculate normal value "on the basis of the value of the factors of production utilized in producing the merchandise * * *." 19 U.S.C. § 1677b(c)(1);[6] 19 C.F.R. § 351.408(a). When valuing factors of production in NME circumstances, subsection 1677b(c) directs Commerce to gather surrogate prices from the "best available information * * * in a market economy country * * * considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1)(B); *see Nation Ford Chem. Co. v. United States,* 166 F.3d 1373, 1377 (Fed. Cir. 1999) ("Whether such analogous information from the surrogate country is 'best' will necessarily depend on the circumstances, including the relationship between the market structure of the surrogate country and a hypothetical free-market structure of the NME producer under investigation."). This being the case, "the process of constructing foreign market value for a producer in a [NME] is difficult and necessarily imprecise." *Sigma Corp. v. United States,* 117 F.3d 1401, 1408 (Fed. Cir. 1997). Commerce enjoys wide discretion in valuing factors of production. *See Lasko Metal Prods., Inc. v. United States,* 43 F.3d 1442, 1446 (Fed. Cir. 1994); *see also Sigma,* 117 F.3d at 1405 ("Commerce * * * has broad authority to interpret the antidumping statute * * *." (citing *Torrington Co. v. United States,* 68 F.3d 1347, 1351 (Fed. Cir. 1995)). However, Commerce's discretion in calculating surrogate prices is not

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[4] Normal value has been summarized as follows:

> Commerce generally calculates the antidumping duty by comparing an imported product's price in the United States to its normal value * * *, which represents the price of comparable merchandise in the exporting country. The dumping margin is the amount by which [normal value] exceeds the US price.

Ta Chen Stainless Steel Pipe, Ltd. v. United States, 23 CIT 804, 806 n.2, (1999) (internal citations omitted).

[5] A NME country is defined by the antidumping statute as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (1994). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C). Commerce's designation of the PRC as a NME country is not disputed.

[6] The statute provides:

> (c) Non-market economy countries
>
> (1) In general
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> If—
>
> (A) the subject merchandise is exported from a nonmarket economy country, and
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> (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined * * *
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> the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. * * * [T]he valuation of factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c)(1). "Thus, 'Commerce's task in a nonmarket economy investigation is to calculate what a producer's costs or prices would be if such prices or costs were determined by market forces.'" *Union Camp Corp. v. United States,* 22 CIT 267, 270, 8 F. Supp. 2d 842, 846 (1998) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States,* 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992)).

limitless. *See* H.R. Conf. Rep. No. 100–576, at 590, *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623 ("Commerce shall avoid using any prices which it has reason to believe or suspect may be * * * subsidized prices."); *see also Shakeproof Assembly Components, Div. of Ill. Toolworks, Inc. v. United States,* 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible.").

A. Surrogate Country

Plaintiffs' first objection concerns Commerce's selection of India as the surrogate market economy country. Plaintiffs argue that India has not been shown by substantial evidence on the record to be a "significant producer" of AJC within the meaning of 19 U.S.C. § 1677b(c)(4)[7] because, in making its determination, Commerce relied on: (1) data contained in a private market study prepared for Petitioners by a paid consultant *(see Petitioners Valuation Submission* of 2/28/00, Pub. R. Doc. 242, Ex. 2 *("Market Study"));* and (2) data relating to AJC production from a single government-controlled company in India, Himachal Pradesh Horticultural Produce Marketing & Processing Corp. ("HPMC"). In addition, Plaintiffs urge the court to reject "the Department's attempt to place the burden on the respondents to disprove the validity of information gathered by a paid consultant * * *." (Pls.' Mem. at 18.)

For its part, the United States ("Government"), on behalf of Commerce, asserts that it found substantial evidence on the record to conclude that India was a significant producer of comparable merchandise:

> In reaching our conclusion, we have first considered what would constitute "comparable merchandise." We believe that, for purposes of this investigation, AJC and SSAJ [single strength apple juice] are comparable. Both are made from the same basic input (juice apples) and the only difference is the extent to which the juice is concentrated. Furthermore, we share the petitioners conclusion that countries with significant apple production are also likely to have significant AJC/SSAJ production.
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> According to the petitioners' market study, total AJC production in India reached over 1,500 metric tons ("MT") in 1998/99 and total SSAJ production was at approximately the same level.[8] As the tenth largest apple growing country in the world, India is a significant producer of apples. Also, the petitioners' market study de-

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[7] This subsection provides:

> The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—
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> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

[8] The court could find no mention of SSAJ production in Petitioners' *Market Study. (See generally Market Study.)*

> scribes numerous producers of AJC/SSAJ in India.[9] While we acknowledge that there is no official country-wide data regarding AJC/SSAJ production in India, the respondents have not provided information that leads us to reject this market study. Finally, there is record evidence of at least one significant producer of comparable merchandise in India, HPMC. This company's 1998/99 annual report shows that it processed over 10,500 MT of apples in 1998/99, part of which was used to produce AJC. We find that this is sufficient evidence to support a conclusion that India is a significant producer of comparable merchandise.

(Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Non-Frozen Apple Juice Concentrate from the P.R.C. of 4/6/00 *("Issues and Decision Mem."),* Pub. R. Doc. 271 at 4.) The court finds that Commerce's conclusion is not in accordance with law or based on substantial evidence on the record.

First, Commerce's use of the Petitioners' *Market Study* is not in accordance with law. Where Commerce is presented with secondary information, to the extent practicable, it is required to corroborate that information in order to evaluate its probative value:

> When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

19 U.S.C. § 1677e(c) (1994); *see also World Finer Foods, Inc. v. United States,* 24 CIT ____, ____, Slip Op. 00–72 at 15–16 (2000) ("The Statement of Administrative Action ('SSA') further clarifies that 'secondary information may not be entirely reliable' and that '[c]orroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value.'" (quoting SAA accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–826(I) at 870, *reprinted in* 1994 U.S.C.C.A.N. at 4199)). Here, Commerce nowhere indicated on the record why it found the Petitioners' *Market Study*[10] to be probative of the Indian AJC industry as a whole. Rather, Commerce merely adopted Petitioners' representations and stated that "respondents have not provided information that leads us to reject this market study." This statement, however, does nothing to enhance the probative value of Petitioners' *Market Study* or lessen the burden of corroborating secondary information, which falls squarely on Commerce.

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[9] In fact, Petitioners' *Market Study* identifies five companies that could have produced AJC during the POR. *(See Market Study* at 7.) The study identifies no companies capable of producing SSAJ. As to which companies actually produced AJC during the POR, the study names companies which at no point are identified as capable of doing so. *(Id.* at 12.)

[10] An examination of Petitioners' *Market Study* reveals that some of its conclusions are based on information from the "National Horticultural Board." *(See Market Study* at 1.) Most of the study's conclusions, however, bear no citations as to the sources used in reaching them. Commerce does not indicate why it considered Petitioners' *Market Study* to be reliable or state that it made any effort to corroborate that the study accurately represented Indian AJC production.

Second, Commerce's conclusion, based on Petitioners' *Market Study,* that India was a "significant producer" of AJC is not supported by substantial evidence on the record. When drawing inferences from the facts on the record Commerce may not rest its decisions on conclusory statements. Rather, Commerce must "articulate a 'rational connection between the facts found and the choice made.'" *Rhodia, Inc.,* 25 CIT at ____, 185 F. Supp. 2d at 1348. Here, Commerce made no such connection but merely adopted the conclusions from Petitioners' *Market Study* without explaining how such conclusions were justified by facts. For example, Commerce's statement that "we share the petitioners' conclusion that countries with significant apple production are also likely to have significant AJC/SSAJ[11] production" is devoid of an explanation. Thus, because Commerce did not adequately explain the connection between the data and conclusions found in Petitioners' *Market Study,* and Commerce's own conclusion that India was a "significant producer of comparable merchandise" such conclusion is not supported by substantial evidence.

Finally, Commerce's finding that HPMC's annual report provided sufficient evidence that India was a significant producer of AJC is not supported by the record. As part of its finding that India was a significant producer of AJC during the POR Commerce stated:

> Finally, there is record evidence of at least one significant producer of comparable merchandise in India, HPMC. This company's 1998/99 annual report shows that it processed over 10,500 MT of apples in 1998/99, part of which was used to produce AJC.

(Issues and Decision Mem., Pub. R. Doc. 271 at 4.) Using HPMC's annual report, Commerce appears to have concluded that if HPMC processed 10,500 MT of apples, and if some unstated percentage of that production was given over to AJC production, it was a reasonable inference that the Indian apple processing industry as a whole was a significant producer of AJC.[12] This conclusion would follow only if it were shown that either: (1) HPMC produced most of the AJC in India and such output was significant; or (2) significant production of AJC by other Indian producers could be extrapolated from the HPMC information. However, Commerce does not explain how, based on HPMC's annual report, it arrived at its conclusion that India was a "significant producer of comparable merchandise" and, thus, because it has not articulated a rational connection between the two, its findings are not supported by substantial evidence.

Therefore, the court finds that Commerce's conclusion that India is a "significant producer of comparable merchandise" is not in accordance with law or supported by substantial evidence on the record. On remand

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[11] With respect to SSAJ production, Commerce apparently took the supposed conclusion from Petitioners' *Market Study* "that countries with significant apple production are likely to have significant AJC/SSAJ production" and assumed that SSAJ production during the POR would equal the amount of AJC production claimed by Petitioners (i.e. 1,500 MT), thus doubling the amount of "comparable merchandise" produced by India and making such production more "significant." As noted previously, Petitioners' *Market Study* does not mention SSAJ.

[12] Plaintiffs note that Commerce "does not even quantify HPMC's production of AJC." (Pls.' Mem. at 19.)

Commerce shall fully explain the reasoning for its selection of the surrogate country and in particular: (1) the steps it took to corroborate the claimed facts found in Petitioners' *Market Study;* (2) the connection between the claimed facts and conclusions found in Petitioners' *Market Study* and Commerce's conclusion that India was a significant producer of AJC, particularly with respect to (a) AJC production and (b) AJC production and SSAJ production; and (3) the reasoning it used connecting HPMC's annual report and such conclusion. In the event Commerce concludes that it is unable to develop sufficient credible evidence of India's suitability as the surrogate market economy country for AJC production, Commerce shall select another suitable country to complete its review and timely alert the court of its decision to do so.

B. Apple Valuation

Next, the court examines whether the value of 2.25 Rupees ("Rs") per kilogram for the production factor, i.e. juice apples, was a "market derived price" actually paid by an Indian AJC producer, and thus an appropriate surrogate value for PRC juice apples. *(See Issues and Decision Mem.,* Pub. R. Doc. 271 at 7–9.)

Plaintiffs maintain that even if India were the proper surrogate market economy for purposes of valuing factors of production, Commerce's use of Indian prices to determine the appropriate value for juice apples was improper.[13] *(See* Pls.' Mem. at 26.) Plaintiffs' main contention is that "the primary raw material input in making AJC—juice apples—was influenced by a 'Market Intervention Scheme' (or 'MIS') whereby the Indian national and provincial governments artificially raised the prices of apples in order to provide a subsidy to the apple growers." (Pls.' Mem. at 22.)

During the course of the investigation, however, Commerce rejected the characterization of the MIS as an unacceptable subsidy program:

> *[T]he Department is primarily concerned with subsidies that enable producers to lower their prices to a point where the prices no longer reflect a fair market value. This is not the case with the MIS program,* which may provide a subsidy to Indian producers of apples but *which, if anything, raises the prices of juice apples to Indian AJC producers as a result of the floor price established by the program.* Second, as the petitioners have pointed out, the MIS program applies only to a small portion of India's total apple crop. Third, the 2.25 Rs/kg price that the Department is using is not the MIS price the growers receive, but a market-derived price actually paid by an India producer of AJC.

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[13] Plaintiffs argue that the Department should not have used Indian prices for apples, but rather Turkish prices. *(See* Pls.' Mem. at 26–28.) In short, Plaintiffs contend that Turkish juice apple price data is more appropriate than Indian price data for purposes of valuing this factor of production because: (1) "Turkish data represented prices from three public commodities exchanges in three different regions in Turkey, thereby allowing the Department to account for the effects of seasonality on prices at the beginning and end of the season, when supply is low and prices are high" *(id.* at 27); and (2) "Turkish data is exactly contemporaneous with the POR * * *." *(Id.)*

In finding preliminarily that India and not Turkey was to be the appropriate surrogate country Commerce stated: "First, we note that India is economically comparable to the PRC, while Turkey is not. Second, we have been able to develop *publicly available factor values* in India without relying on proprietary information submitted by the petitioners." *Preliminary Determination,* 64 Fed. Reg. at 65,679 (emphasis added).

(Issues and Decision Mem., Pub. R. Doc. 271 at 9 (emphasis added).) Thus, the Government contends that Commerce properly found that the MIS did not automatically render Indian prices unusable for purposes of selecting surrogate values for juice apples. Commerce concluded that the MIS did not "disturb[ ] the fair market value of Indian apples for purposes of valuation" (Def.'s Resp. to Pls.' Mem. Supp. Mot. J. Agency R. ("Def.'s Resp.") at 17 (citing *Preliminary Determination,* 64 Fed. Reg. at 65,679)) and that the 2.25 Rs/kg price was a "market-derived price actually paid by HPMC for juice apples during the [POR]." (Def.'s Resp. at 19.) Thus, the Government argues, such values were appropriate to use.

This conclusion is difficult to credit. Commerce's position does not appear to take into account that a government program that raises the value of a factor of production would necessarily raise normal value to Plaintiffs' disadvantage. Here, the program established a floor price for juice apples, 2.25Rs/kg. As noted above, Commerce concedes that the MIS "if anything, raises the prices of juice apples * * *." *(Issues and Decision Mem.,* Pub. R. Doc. 271 at 9.) Indeed, the Government does not argue otherwise, but explains that its primary concern is "with subsidies that enable producers to lower their prices to a point where the prices no longer reflect a fair market value" *(id.),* and that "the Department therefore 'draws a line' with government subsidies that tend to enable producers to lower their price to the point where they (the prices) may not reflect fair market value. In such cases, the Department considers alternative factor price data." *Preliminary Determination,* 64 Fed. Reg. at 65,679. Thus, it is Commerce's policy to seek alternative factor price data if the value of a factor is lowered by a subsidy, but not if the value of the factor is raised. As Commerce's explanation fails to "articulate a 'rational connection between the facts found and the choice made,'" *Rhodia, Inc.,* 25 C.I.T. at ____, 185 F. Supp. 2d at 1348, or demonstrate its conclusion to be one that represents an effort to establish antidumping margins "as accurately as possible," *Shakeproof,* 268 F.3d at 1382, its conclusion is neither supported by substantial evidence nor in accordance with law.

As to the Government's claim that the 2.25 Rs/kg price "is not the MIS price the growers receive, but a price actually paid by an Indian producer of AJC," this conclusion is not borne out by the evidence on the record. HPMC, the Indian producer of AJC on whose data Commerce relied in determining the value of juice apples, is a government controlled company that administers the MIS by purchasing apples to stabilize prices.[14] In addition, HPMC has not historically made a profit, and its losses are made up by loans from the Himachal Pradesh state government and from other government sources. *(See HPMC At A Glance,* Pub. R. Doc. 90, Ex. C at 5.) Thus, HPMC activities do not appear to be

[14] HPMC, "in 1996–97 [became] a fully owned Government Company." *(See HMPC's 25th Annual Financial Report For Year 1998–99,* Pub. R. Doc. 238, Ex. D at D–1; *see also HPMC At A Glance,* Pub. R. Doc. 90, Ex. C at 3 (stating HPMC administers the MIS to stabilize prices).)

market driven. HPMC itself cites several reasons for its yearly losses including "MIS has become the main activity of the Corporation" *(id.)* and "the high cost of processing grade apples @ Rs. 2.25 per kg. add to the higher cost of Apple Juice Concentrate and the Corporation is becoming incapable of competing in international market * * *. In fact, this component itself over the last four years incurred losses to the tune of Rs. 4.61 Crores."[15] *(Id.* at 5–6.) Thus, it is questionable whether the price "actually paid" by such company is a market-derived price. On this issue Commerce states that "Despite a certain level of government involvement in the Indian economy, it is the Department's longstanding practice to treat most Indian prices and costs as market-determined under the antidumping law." *(Issues and Decision Mem.,* Pub. R. Doc. 271 at 9.) The issue, though, is not the Indian government's generalized involvement in the economy. Rather, the issue here is the particular distortions resulting from the MIS, which Commerce did not to take into account when valuing juice apples. In this regard, it is impossible to ignore the result that the floor price set by the MIS is exactly the same as the price Commerce claims to be the "free market price." Therefore, because the evidence on the record indicates that the MIS is a subsidy tending to increase the price paid for juice apples, and that the HPMC purchase of juice apples at 2.25 Rs/kg is not market driven but an inflated price that HPMC paid as part of the MIS, the conclusion that the amount HPMC paid for juice apples was a market derived price is not supported by substantial evidence on the record.

On remand, Commerce shall fully explain, (1) why the distortions caused by the MIS "did not disturb the fair market value of Indian apples for purpose of valuation," (2) fully explain its policy of taking into account only "government subsidies that tend to enable producers to lower their price to the point where they (the prices) may not reflect fair market value" and not those that tend to raise prices with the same result, and (3) why HPMC, as a government controlled entity that administered the MIS to its detriment, should be considered to have paid "a market derived price" for its apples.

C. Ocean Freight Expenses Valuation

Plaintiffs' next claim is that Commerce did not sufficiently justify its use of surrogate ocean freight expenses. In its *Final Determination* Commerce used a surrogate rate rather than accepting Plaintiffs' documentation of the amount they paid for ocean freight expenses. According to Plaintiffs, in response to Commerce's regulations for valuing factors of production, they supplied the actual amount paid for ocean freight costs because their "goods were shipped by market economy companies and charges were incurred in a market economy currency." (Pls.' Mem. at 11.) Plaintiffs urge that the proof they submitted comports with Commerce's policy that, in the context of a NME, "where a factor is purchased from a market economy supplier and paid for in mar-

[15] A single "Crore" is equivalent to 10,000,000 rupees.

ket economy currency, the Secretary will normally use the price paid to the market economy supplier." 19 C.F.R. § 351.408(c)(1).[16] Plaintiffs make no objection to the regulation itself, rather, they claim that the invoices presented satisfy the regulation's requirements.

Commerce, however, reviewed the proffered proof of payment and found it unacceptable because, although Plaintiffs' payment was made in a market economy currency, it was made to a PRC freight forwarder rather than to the market economy carrier. Thus, as Defendant-Intervenors point out, Commerce concluded: "In this case, *nonmarket* respondents offered documentation of payment to another *nonmarket* entity, here a freight forwarder. However, Plaintiffs failed to provide the Department with any evidence of transactions between the PRC freight forwarder and the market-economy ocean carriers used to transport the merchandise." (Def.–Intervenors' Resp. to Pls.' Mem. Supp. Mot. J. Agency R. at 20–21 (emphasis in original).) In order to determine the value of this factor, Defendant-Intervenors claim, Commerce must have "documentation of the actual purchase from the market economy supplier." *(Id.* at 21.) In other words, Commerce and Defendant-Intervenors demand documentation of the amount actually paid to the shipping company, and not just proof of the amount paid to the freight forwarder.

Plaintiffs assert that all the regulation requires is that an input be (1) "purchased from a market economy supplier" and (2) "paid for in a market economy currency" and that they satisfied both requirements. Plaintiffs ignore, however, the regulation's injunction that "the Secretary will normally use the price *paid to the market economy supplier."* 19 C.F.R. § 351.4085(c)(1) (emphasis added). Thus, under the regulation, merely establishing that the factor was purchased from a market economy supplier is not enough; rather, the amount paid to the supplier must be documented. Indeed, Plaintiffs agree that the "stated rationale for the market economy input rule is to use those costs for a respondent 'determined by market forces' in order to promote accuracy and fairness" (Pls.' Mem. at 35 (citation omitted)) but offer no convincing reason why a transaction between two nonmarket entities would be determined by market forces. While Plaintiffs cite several instances[17] where Commerce has considered transactions involving a freight forwarder, they have not identified one in which Commerce has accepted a transaction between two nonmarket entities as proof of the cost of ocean freight ex-

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[16] Subsection 351.408(c)(1) provides:

> For purposes of valuing the factors of production, general expenses, * * * and other expenses under [19 U.S.C. § 1677b(c)(1)] the following rules apply:
>
> (1) Information used to value factors. The Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier.

19 C.F.R. 351.408(c)(1).

[17] For instance, Plaintiffs cite *Notice of Final Determination of Sales at Less Than Fair Value: Bulk Aspirin From the P.R.C.,* 65 Fed. Reg. 33,805 (May 25, 2000) as supporting their position. In *Bulk Aspirin,* Commerce rejected respondent's ocean freight expenses "because the freight forwarder invoices provided by the respondents only evidenc[ed] the amount charged by the market economy carrier to the freight forwarder." (Pls.' Mem. at 36 (citing *Bulk Aspirin,* 65 Fed. Reg. 33,805 (Issues and Decisions Memorandum comment 8)).) What *Bulk Aspirin* demonstrates, however, is that in order for a transaction to be market based, both the amount paid by the nonmarket entity and the amount charged by the market economy supplier must be documented.

penses. Therefore, Commerce's conclusion is not a departure from past practice and is in accordance with its regulations. Because both the Plaintiffs and the freight forwarder do business in a nonmarket economy country which "does not operate on market principles," *see* 19 U.S.C. § 1677(18)(A), it hardly seems unreasonable that proof of what was paid to a market economy supplier should be used to substantiate that the amount paid for this factor was "determined by market forces." Absent this, Commerce is justified in its use of a surrogate freight price. Thus, Commerce's valuation of ocean freight expenses is in accordance with law.

D. Steam Coal Valuation

Plaintiffs' next objection is that in its valuation of steam coal as a factor of production, Commerce erred in using data for coal imported by India rather than domestically produced coal. In support of their objection, Plaintiffs contend "the record * * * contains no evidence that the domestic coal price in India is inaccurate or distorted. To the contrary, the facts indicate that the import price is unrealistic for AJC producers because they have no need to purchase the higher-priced imported coal." (Pls.' Mem. at 41.)

The Government contends that Commerce's use of imported coal data from the *Monthly Statistics*[18] was justified because the "information was deemed the most contemporaneous with the POR." (Def.'s Resp. at 25–26.) The Government also argues that "the Department found that the * * * data provided a more accurate surrogate value of coal costs than the resource[19] offered by plaintiffs." *(Id.* at 26.) Finally, the Government asserts that "[t]his Court has stated that the Department need not duplicate the exact production experience of the [Chinese] manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value [of the subject merchandise] in a market economy." (Def.'s Resp. at 26–27 (citing *Nation Ford,* 166 F.3d at 1377).) The court does not agree that this reasoning adequately supports Commerce's conclusion.

In support of its valuation of steam coal, Commerce stated:

> In this case, we find that because the 1997/98 *Monthly Statistics* information is more contemporaneous with the [POR], it is a more appropriate surrogate than the 1996 *EP&T* data. There is no evidence on the record to suggest that the *Monthly Statistics* data is aberrational or unreliable. Furthermore, the courts have stated that the Department is not required to use domestic prices solely because

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[18] 2 Directorate General of Commercial Intelligence & Statistics, Ministry of Commerce, Government of India, *Monthly Statistics of Foreign Trade of India* (1998).

[19] Plaintiffs' proposed source, *Energy Prices and Taxes* is published by the Organisation for Economic Co-Operation and Development. *(See Valuation of Factors of Production,* Pub. R. Doc. 266, Ex. 17; *see also* Pls.' Reply, Ex. 5.) This periodical "provides OECD country statistics on energy prices and taxes for all energy sources and main consuming sectors. The data system responds to the need identified by International Energy Agency (IEA) Energy Ministers for improved information on national and international energy markets and attempts to meet the requirements of those involved in international energy issues." *See* http://www.oecdwash.org /PUBS/PERIOD/per-ept.htm (last visited June 6, 2002).

> they are available, but instead it should use the "best available information."

(Issues and Decision Mem., Pub. R. Doc. 271 at 12–13 (citing *Nation Ford,* 166 F.3d at 1377).)

Commerce's discussion, however, fails to explain why its use of imported coal data "best approximate[s]" the cost of coal incurred by Indian AJC producers during the POR. *Nation Ford,* 166 F.3d at 1376. While the data relied upon by Commerce may be "more contemporaneous" with the POR and not "aberrational or unreliable," these facts do not naturally lead to the conclusion that such data is an accurate reflection of the price paid for coal by domestic Indian AJC producers during the POR. Commerce nowhere explains how the use of seemingly more expensive imported coal data is the best available information establishing the actual costs incurred by Indian AJC producers.

The Government relies on *Nation Ford* to support its position. This reliance is misplaced and indeed, that case tends to bolster Plaintiffs' position. In *Nation Ford* the Court of Appeals for the Federal Circuit found that Commerce's selection of imported aniline data was reasonable because, as a result of a tariff provision, Indian sulfanilic acid producers purchased imported (rather than domestic) aniline when producing sulfanilic acid for export.[20] The court found that the "'values [selected] best approximate the cost incurred by the sulfanilic acid exporters in India * * *.'" *Nation Ford,* 166 F.3d at 1376 (citation omitted). Here, Commerce has produced no evidence tending to lead to the conclusion that India's domestic AJC producers would use imported as against domestic coal.

Thus, the court cannot find Commerce's conclusion that imported steam coal data is the "best available information" is supported by the record because: (1) there is no indication that the domestic Indian coal market was distorted in the manner the domestic sulfanilic acid market was in *Nation Ford* such that the use of import data was preferred; and (2) there is no indication that the use of imported coal values "best approximate the cost incurred" for Indian AJC production. Therefore, this issue is remanded for Commerce to either: (1) recalculate normal value using the domestic coal data provided by Plaintiffs; or (2) provide an explanation of why the use of domestic coal data (adjusted for inflation or deflation if necessary) would not more accurately approximate the experiences of Indian AJC procedures during the POR.

E. SG&A and Factory Overhead Valuation

Next, Plaintiffs challenge Commerce's decision to rely on the "1992–93 [financial] data [taken] from the * * * *Reserve Bank of India Bulletin,* January 1997" ("RBI"), *Preliminary Determination,* 64 Fed. Reg. at 65,680, in the calculation of selling general and administrative

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[20] The court explained "India protected its domestic aniline industry from global competition with an 85% import tariff, and * * * this tariff caused the price of domestically-produced aniline to be inflated. * * * [T]his tariff, however, was not paid by Indian sulfanilic acid producers if they used the aniline to produce sulfanilic acid for export. Not surprisingly, Indian sulfanilic acid producers who exported their product bought imported aniline instead of domestic aniline * * *." *Nation Ford,* 166 F.3d at 1375.

expenses[21] ("SG&A"), and overhead ratios. Plaintiffs contend that "Commerce's decision to disregard the 1998–99 audited financial data of the largest known Indian AJC producer [HPMC] in favor of a general 'basket category' of financial data from 1992–93 is unsupported by the regulations * * * and the evidence and facts on [the] record." *(See* Pls.' Mem. at 28.) Plaintiffs urge that Commerce should have used HPMC's 1998–99 financial data, because the RBI data was six years older than HPMC's financial data, and was taken from "multiple and unrelated industries." *(See id.* at 31.) Plaintiffs, further, contend that it was inconsistent for Commerce to rely on HPMC's 1998–99 financial statements in selecting India as the surrogate country and in valuing juice apples, while simultaneously rejecting such data for calculating surrogate SG&A expenses and overhead ratios.

The Government disputes Plaintiffs' contentions and argues that Commerce correctly determined that it could not use HPMC's 1998–99 financial data for surrogate SG&A expenses and overhead ratios. On this point, Commerce stated:

> HPMC was the largest producer of the subject merchandise in India, but the record indicates that as much as eighty (80) percent of its revenues came from activities other than the production of fruit juice. Although the Department was able to rely upon HPMC's data for the price of juice apples, the Department determined that it could not rely upon HPMC for overhead and SG&A expenses because its expenses would not be representative of the overhead and SG&A expenses that would be incurred by a PRC AJC producer.

(Def.'s Resp. at 28.)

In determining normal value for an exporter from a NME country Commerce's regulations offer some guidance with respect to the valuation process. Specifically, subsection 351.408(c) of the Code of Federal Regulations provides, that for valuing "manufacturing overhead, general expenses, and profit, the Secretary normally will use nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(4). In this case, however, rather than use "data from [an] actual producer[] of [the] subject merchandise in the surrogate country" *(Issues and Decision Mem.* Pub. R. Doc. 271 at 16), namely HPMC, Commerce relied on more generalized RBI data, because it believed "that the RBI data [was] the best information on the record to value SG&A, overhead, and profit." *(Id.)* In turning to the RBI data, Commerce was primarily concerned that:

> AJC production consists of a relatively small portion of HPMC's total revenues[[22]], and that the total revenues of HPMC are primarily

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[21] SG&A "is a ratio of general expenses to the cost of manufacturing." *Magnesium Corp. of Am. v. United States,* 166 F.3d 1364, 1371 (Fed. Cir. 1999) (citing *Magnesium Corp. of Am. v. United States,* 20 CIT 1092, 1104, 938 F. Supp. 885, 898 (1996)).

[22] Commerce does not relate this statement to expenses, which are the primary concern here, or to HPMC's statement that "MIS has become the main activity of the Corporation * * *." *(HPMC At A Glance,* Pub. R. Doc. 90, Ex. C at 5.)

> derived from service-oriented rather than manufacturing operations. In contrast, the RBI data used at the preliminary determination is derived from manufacturing industries, including those involved in the production of food products.

(Issues and Decision Mem., Pub. R. Doc. 271 at 16.)

Thus, the issue for the court is whether Commerce acted within its discretion when it disregarded the financial data contained in AJC producer HPMC's publicly available annual report and relied, instead, on more generalized RBI data in calculating SG&A expenses and overhead ratios. The record does not support Commerce's decision. Commerce's regulation provides that it "normally" will rely on "nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(4). Commerce followed this practice when using the financial data of an Indian AJC producer, i.e., HPMC, for purposes of seeking the surrogate market economy and proper value of juice apples. For purposes of estimating SG&A expenses and overhead ratios, however, Commerce rejected the use of the financial data from HPMC—an entity it concluded was a producer of comparable merchandise. Instead, Commerce relied on more generalized RBI data, which was: (1) dramatically more outdated than the data Commerce rejected when seeking data with which to value the factor steam coal; and (2) appears to bear little relationship to the actual costs incurred by an Indian AJC producer. Though Commerce's claim—that HPMC's financial data may not accurately reflect the SG&A expenses and overhead ratios of an Indian AJC producer—may be relevant, Commerce has nowhere stated that it made an examination of HPMC's financial data to determine if reliable SG&A expenses and overhead ratios could be calculated. Indeed, Plaintiffs not only argue that HPMC's financial data sufficiently detailed to make SG&A expenses and overhead ratios, they have submitted evidence, taken from the record, tending to establish the adequacy of this financial data for these purposes. *(See Respondents' Additional Surrogate Information,* 2/25/00, Pub. R. Doc. 238 Ex. D-E.)[23]

Therefore, the court finds that Commerce's decision to value SG&A expenses and overhead ratios on the basis of more generalized RBI data is not supported by substantial evidence on the record. On remand Commerce shall: (1) recalculate normal value using information from HPMC's financials; or (2) fully explain why it departed from its normal practice of relying on nonproprietary information gathered from producers of identical or comparable merchandise in a surrogate country for purposes of valuing SG&A expenses and overhead ratios; and in particular, Commerce shall: (a) fully explain why it rejected the use of the

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[23] For example, in Exhibit E Plaintiffs, using Commerce's methodology, calculated SG&A expenses and overhead ratios based on HPMC's financial data. *(Respondents' Additional Surrogate Information,* 2/25/00, Pub. R. Doc. 238, Ex. D at D–7, Ex. E ("In the event that [Commerce] continues to use India as a surrogate country, the HPMC financial report can be used to calculate ratios for factory overhead and SG&A expenses. In that regard, we attach as Exhibit E a calculation of the factory overhead and SG&A ratios, using the same methodology used by [Commerce] in the Preliminary Determination."; *see also* Pls.' Mem. at 11 ("Based on the data contained in [HPMC's] audited 1998–99 financial report, [Plaintiffs] calculated factory overhead and SG&A ratios * * *.")).)

financial data of HPMC, an entity that Commerce concluded was a producer of comparable merchandise and, instead, relied on more generalized RBI data, and further (b) why the calculations made by Plaintiffs should not be used to value these factors.

F. East Coast Surrogate Freight Calculation

Finally, Plaintiffs dispute the calculation of east coast surrogate freight costs by the inclusion of "the cost of sending freight to Detroit, a city that is approximately 600 miles away from the East Coast." (Pls.' Mem. at 38). Plaintiffs claim that, "As noted in Respondents' submission, the Qingdao to Detroit freight rate was provided only to account for certain shipments made by *one* respondent to a port near Detroit * * *. All other east coast shipments from all respondents were made to *coastal* ports." (Pls.' Mem. at 39 (emphasis as in original).) Thus, Plaintiffs argue that three rates should have been established: (1) an east coast rate; (2) a west coast rate; and (3) a Detroit rate for those shipments made to that city. Plaintiffs further argue that including the cost of shipping to Detroit in either the east or west coast rates would unfairly increase these rates to Plaintiffs' disadvantage and "unnecessarily reduce[] the accuracy of the surrogate freight [rates.]" (Pls.' Mem. at 39.) The Government's only comment with respect to Commerce's decision to include the Detroit costs in the east coast rate is to declare that it would have been inappropriate to include the costs in the west coast rate:

> [T]here is little evidence in the documentation provided by the respondents supporting their claim that freight to Detroit is shipped via the West Coast. * * * Because of the contradictory and confusing information on the record, we included Detroit in the East Coast average because in the Department's experience, freight to that city normally goes via the east Coast.

(Def.'s Resp. at 36 (quoting *Allegation of Clerical Errors in the Final Calculations Mem.,* Pub. R. Doc. 295, Attach. at 4).) Plaintiffs' argument, however, is that the costs of shipping to Detroit should not have been included in either the east or west coast averages (Pls.' Mem. at 39) and that a separate rate should have been calculated for Detroit. *(Id.,* n.12 ("Since the 'Port of Importation' field (IMPORTU) in this respondent's U.S. Sales database submitted to Commerce clearly indicated which sales were shipped to the Detroit area, Commerce was fully capable of applying the Detroit freight rate to those particular sales while leaving the East Coast freight rate unaltered for all other East [C]oast sales to coastal cities.").) "The inclusion of the Detroit freight rate in the East Coast calculation does nothing but diminish the accuracy of this calculation (the Detroit freight cost is 25% higher than the legitimate East Coast freight rates). Including the Detroit rate in the West Coast calculation would be equally distortive." (Pls.' Reply Mem. at 13.) In addition, Commerce, without explanation, failed to take into account the volume of freight sent to each port, valuing the few shipments to De-

troit equally to the many shipments to New York. Thus, the east coast rate was skewed by Detroit's inclusion.

Since the Government failed to address Plaintiffs' seemingly reasonable argument at any point in its papers and Commerce has similarly failed to address it at any point including in its *Final Determination,* this matter is remanded for a fuller explanation of why a separate Detroit rate should not be calculated. On remand, Commerce shall specifically address Plaintiffs' argument that a separate Detroit freight rate should be calculated and fully explain its reasons for not doing so and, in addition, explain its policy of not weighting shipments to various destinations so as to accurately reflect the volume of merchandise actually shipped to each destination.

II. Ministerial Errors

Plaintiffs argue that "Commerce's failure to modify the deposit rates to correct its own mistakes in the *Preliminary Determination* acted to deny U.S. importers the benefit of the 'Provisional Measures Deposit Cap' set forth in 19 U.S.C. 1673f(a)."[24] ("Capping Provision") (Pls.' Mem. at 42.) For its part, Commerce argues that its decision not to amend "insignificant Ministerial Errors Arising in the Preliminary Determination" was consistent both with its regulations and with the Capping Provision. (Def.'s Resp. at 30); 19 C.F.R. § 351.224; 19 U.S.C. § 1673f(a).

Pursuant to the Capping Provision, liability for duties established by a final determination are set at the amount established by a preliminary determination such that if the cash deposit or bond amount set at the preliminary determination is different from the duty amount determined pursuant to the final antidumping duty order, then the difference will be "(1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order." 19 U.S.C. § 1673f(a). In other words, by making the deposit in the amount set by the *Preliminary Determination,* Plaintiffs capped their liability at the amount of the deposit, even if the duty amount in the *Final Determination* was higher. In accordance with its regulations, however, Commerce makes corrections in a preliminary determination only when it finds a "significant minis-

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[24] This subsection provides:

> If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section [19 U.S.C. § 1673b(d)(1)(B)] is different from the amount of the antidumping duty determined under an antidumping duty order published under [19 U.S.C. § 1673e], then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under [19 U.S.C. § 1673d(b)] is published shall be—
>
> (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or
>
> (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

19 U.S.C. § 1673f(a) *(amended* 1996). Thus, there is a cap on liability for payment of duties, equal to the amount of the cash deposit rate provided for by the preliminary determination, on merchandise entered between a preliminary determination and a final determination.

terial error." 19 C.F.R. § 351.224(e).[25] Plaintiffs claim that by refusing to correct all ministerial errors found in the *Preliminary Determination* the amount of their deposit was greater than would otherwise have been the case, and that they have, therefore, been denied "an important statutory right" to which the Capping Provision entitled them. (Pls.' Mem. at 44.) Thus, Plaintiffs claim that Commerce must make adjustments, in the *Preliminary Determination,* for all errors in the calculation of the rate and not just significant errors. As such, Plaintiffs claim that "the DOC's reliance upon its own regulation was unlawful, where, as here, that regulation operated contrary to the statute." (Pls.' Mem. at 45.)

In opposing Plaintiffs' argument, the Government contends that Commerce's regulation is consistent with the Capping Provision, and the regulation conforms to the statute under which the regulation was promulgated because that statute provides for the correction of ministerial errors only in final determinations, and is thus silent with respect to amending a preliminary determination to correct ministerial errors. *See* 19 C.F.R. § 351.224(e).[26]

The court agrees with the Government. Commerce's regulation is entitled to receive deference under the *Chevron* doctrine. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984). Second, the regulation is not in conflict with the Capping Provision because that statute merely directs how the deposit rate should be used, not how it should be calculated.

The Supreme Court has held that where an agency puts forth an interpretation of a statute that is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843; *see also Christensen v. Harris County,* 529 U.S. 576, 586–87 (2000) (citing *Chevron,* 467 U.S. at 842–44) ("In *Chevron,* we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."). As such, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States v. Mead Corp.,* 533 U.S. 218, 226–27

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[25] This subsection provides for correction of significant ministerial errors found in a preliminary determination. "Ministerial error" means "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 C.F.R. § 351.224(f). A ministerial error is significant when: "the correction of which, either singly or in combination with other errors: (1) Would result in a change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin * * * calculated in the original (erroneous) preliminary determination; or (2) Would result in a difference between a weighted-average dumping margin * * * of zero (or *de minimis)* and a weighted-average dumping margin * * * of greater than *de minimis,* or vice versa." 19 C.F.R. § 351.224(g).

[26] Subsection 1673d(e) of title 19 provides:

> The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term "ministerial errors" includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

19 U.S.C. § 1673d(e).

(2001), and the regulation was subject to a "relatively formal administrative procedure * * *."[27] *Id.* at 230.

Here, the regulation was promulgated pursuant to Congressional authority. Further, it is a permissible interpretation of the interpreted statute. In the preamble to the proposed regulation, Commerce stated:

> In establishing [the significant ministerial error] standard, which, as a matter of administrative practice, the Department has applied successfully for several years, the Department had to balance the competing interests of accurate preliminary determinations and the need to complete the investigation in a timely manner. The Department has determined that the current standard allows it to correct the most serious errors promptly, while also permitting it to complete verification and issue a timely final determination.

Antidumping Duties: Countervailing Duties; Proposed Rule, 61 Fed. Reg. 7,308, 7,321 (Feb. 27, 1996). In fulfilling its responsibility to "establish procedures for the correction of ministerial errors in final determinations," 19 U.S.C. §1673d(e), it is surely a permissible construction of the statute for Commerce to begin the process in the context of a preliminary determination and take into account the considerations outlined above. This is particularly the case where the statute is entirely silent, and thus ambiguous, as to the correction of ministerial errors in a preliminary determination.

Nor is the regulation in conflict with the Capping Provision. The Capping Provision merely provides for a use to which the duty rates computed with the preliminary determination are to be put, without in any way stating how they should be determined. While it may be more advantageous to Plaintiffs for the deposit, and hence their ultimate liability, to be less, this result is not mandated by statute. Thus, the policy found in Commerce's regulation is in accordance with law.

CONCLUSION

Based on the reasons set forth above, the court remands this matter to Commerce, so that it may conduct further proceedings consistent with this opinion. Such remand results are due within ninety days from the date of this opinion. Plaintiff shall have thirty days thereafter within

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[27] Commerce revised its regulations on antidumping and countervailing duties to conform them to the Uruguay Round Agreements Act. Part 351 of the Code of Federal Regulations replaced former parts 533 and 535. Commerce published the following notices as a part of its rulemaking activity and received over five hundred written public comments: *Advance Notice of Proposed Rulemaking and Request for Public Comments (Antidumping Duties; Countervailing Duties; Article 1904 of the North America Free Trade Agreement),* 60 Fed. Reg. 80 (Jan. 3, 1995); *Advance Notice of Proposed Rulemaking: Extension of Comment Period (Antidumping Duties; Countervailing Duties; Article 1904 of the North America Free Trade Agreement),* 60 Fed. Reg. 9,802 (Feb. 22, 1995); *Interim Regulations; Request for Comments (Antidumping and Countervailing Duties),* 60 Fed. Reg. 25,130 (May 11, 1995); (4) *Proposed Rule; Request for Comments (Antidumping and Countervailing Duty Proceedings; Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order),* 61 Fed. Reg. 4,826 (Feb. 8, 1996); *Notice of Proposed Rulemaking and Request for Public Comments (Antidumping Duties; Countervailing Duties),* 61 Fed. Reg. 7,308 (Feb. 27, 1996); *Extension of Deadline to File Public Comments on Proposed Antidumping and Countervailing Duty Regulations and Announcement of Public Hearing (Antidumping Duties; Countervailing Duties),* 61 Fed. Reg. 18,122 (Apr. 24, 1996); *Announcement of Opportunity to File Public Comments on the Public Hearing of Proposed Antidumping and Countervailing Duty Regulations (Antidumping Duties; Countervailing Duties),* 61 Fed. Reg. 28,821 (June 6, 1996); *Notice of Proposed Rulemaking and Request for Public Comments (Countervailing Duties),* 62 Fed. Reg. 8,818 (Feb. 26, 1997); and *Extension of Deadline to File Public Comments on Proposed Countervailing Duty Regulations (Countervailing Duties),* 62 Fed. Reg. 19,719 (Apr. 23, 1997). *See Final Rule,* 62 Fed. Reg. 27,296 (May 19, 1997). Commerce promulgated the regulations contained in Part 351 pursuant to 5 U.S.C. § 301; 19 U.S.C. § 1202 note; 19 U.S.C. § 1303 note; 19 U.S.C. § 1671 *et seq.;* and 19 U.S.C. § 3538.

which to file comments and Commerce may reply to any such comments within eleven days of their filing.

(Slip Op. 02–57)

POMEROY COLLECTION, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 99–02–00096

[Plaintiff's motion for summary judgment denied, Defendant's cross-motion for summary judgment granted, and action dismissed.]

(Decided June 19, 2002)

Fitch, King and Caffentzis (Peter J. Fitch), for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert); Beth C. Brotman,* Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* This case is before the Court on cross-motions for summary judgment. Plaintiff Pomeroy Collection, Inc. ("Pomeroy") challenges the decision of the United States Customs Service ("Customs") denying Pomeroy's protests concerning the tariff classification of certain merchandise imported from Mexico in 1997 and described on the invoice as "Medium Romano Floor Lamps Rustic." Customs classified the merchandise as decorative glass articles—specifically, "[g]lassware of a kind used for * * * indoor decoration or similar purposes," under subheading 7013.99.90 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1997)—and assessed duties at the rate of 5.2% *ad valorem*. Pomeroy contends that the goods instead are properly classifiable as "[o]ther articles of glass," under subheading 7020.00.60, HTSUS, and are thus duty-free.[1] Complaint ¶ 5.[2]

Jurisdiction lies under 28 U.S.C. § 1581(a) (1994). Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994). For the reasons discussed below, Customs properly classi-

[1] Specifically, subheading 7013.99.90 covers "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Other: Other: Valued over $3 each: Other: Valued over $5 each." Subheading 7020.00.60 covers "[o]ther articles of glass: Other."

Both the classified and claimed tariff provisions in this case are properly preceded by the prefix "MX," to indicate that the goods qualify for the duty rate applicable to products of Mexico. *See* Plaintiff's Memorandum In Support of Its Motion For Summary Judgment ("Plaintiff's Brief") at 2 n.2. However, the prefix is otherwise irrelevant to this classification analysis, and is omitted throughout the opinion.

Similarly, at the time of entry, subheading 7020.00.60 was designated 7020.00.00, HTSUS. But that change too is of no moment here. *See* Plaintiff's Brief at 2 n.2; Defendant's Memorandum In Support of Its Motion For Summary Judgment and In Opposition to Plaintiff's Motion For Summary Judgment ("Defendant's Brief") at 1 n.1.

[2] Pomeroy's Complaint alleged, as an alternative theory, that the merchandise at issue is properly classifiable as "statuettes and other ornaments, of base metal," under subheading 8306.29.00, HTSUS, also duty-free. *See* Complaint ¶¶ 6, 16, 17. However, as discussed in note 7 below, Pomeroy has largely abandoned that argument in its briefs.

fied the subject merchandise as decorative glass articles, under subheading 7013.99.90, HTSUS. Accordingly, Pomeroy's motion for summary judgment is denied, and the Government's cross-motion is granted.

I. BACKGROUND

The merchandise at issue is principally used for indoor decoration, and consists of two separate components—a glass vessel with a rounded bottom, and a wrought iron pedestal or stand. *See* Plaintiff's Exhibit 1 (a representative sample of the merchandise at issue) ("Sample"); Defendant's Statement of Additional Material Facts As To Which There Is No Genuine Dispute to Be Tried ("Def.'s Statement of Add'l Mat. Facts) ¶¶ 1, 3; Plaintiff's Brief at 6–7 (indicating agreement with Customs' description of function of merchandise); Plaintiff's Reply to Defendant's Memorandum In Support of Its Motion For Summary Judgment and In Opposition to Plaintiff's Motion for Summary Judgment ("Plaintiff's Reply Brief") at 7 (noting "the agreement of the parties as to the facts");[3] Plaintiff's Statement of Material Facts As to Which There Are No Genuine Issues to Be Tried ("Pl.'s Statement of Mat. Facts") ¶¶ 2, 3; Defendant's Response to Plaintiff's Statement of Material Facts As to Which There Are No Genuine Issues to Be Tried ("Def.'s Resp. to Pl.'s Statement of Mat. Facts") ¶¶ 2, 3.

The pedestal, which stands approximately thirty inches high, is designed to cradle (that is, to hold and support) the glass vessel. *See* Sample; Plaintiff's Brief at 6–7; Defendant's Brief at 5. When it is inserted in the pedestal, with its open end facing upward, the vessel is used to hold a candle or some other object such as flowers, a plant, or a bottle of wine. *See* Sample; Def.'s Statement of Add'l Mat. Facts ¶ 3; Plaintiff's Reply Brief at 7 (noting "the agreement of the parties as to the facts"); Affidavit of Edward Todd Pomeroy ("Pomeroy Aff.") ¶ 5 (although the goods were "designed as candle holders * * * they can be used to hold a variety of articles other than candles"). The rounded bottom of the glass vessel prevents it from standing on its own or from functioning in its intended manner without the wrought iron pedestal. *See* Sample; Pl.'s Statement of Mat. Facts ¶ 3; Def.'s Resp. to Pl.'s Statement of Mat. Facts ¶ 3.

A. CUSTOMS' 1994 RULING

Customs' classification of the merchandise in the instant case was predicated on a prior ruling. In that ruling (the "1994 Ruling"), Customs classified goods—marketed as "floor candles," and consisting of wrought iron pedestals and glass vessels—that were similar in all material respects to the merchandise at issue in this case. HQ 956810 (Nov. 28, 1994). The same glass vessels are used in both articles, and the styles

[3] Although Pomeroy reiterated in its reply brief that the parties agree on the facts of the case (*see* Plaintiff's Reply Brief at 7), Pomeroy failed to file the required response to Defendant's Statement of Additional Material Facts. *See* USCIT R. 56(h) (all material facts set forth in movant's statement of facts deemed to be admitted "unless controverted by the statement *required* to be served by the opposing party) (emphasis added). In any event, whether by virtue of Pomeroy's statement in its reply brief, or by virtue of its failure to respond to Defendant's Statement of Additional Material Facts, all material facts set forth in Defendant's Statement are deemed to be admitted. *See United States v. Continental Seafoods, Inc.*, 11 CIT 768, 672 F. Supp. 1481 (1987).

of the wrought iron pedestals differ only slightly. *See* Pomeroy Aff. ¶¶ 2, 4.

In its 1994 Ruling, Customs acknowledged the two separate components of the merchandise (the pedestals and the glass vessels), and therefore treated the "floor candles" as "composite goods." HQ 956810 (Nov. 28, 1994). Finding that the glass vessel is the component that fulfills the function of the article, Customs determined that it is the glass vessel which imparts its "essential character" to the merchandise. *Id*. Based on that determination, Customs classified the "floor candles" as decorative articles of glass, under subheading 7013.99.90, HTSUS—the same classification it applied to the merchandise at issue here. *Id.*

B. CUSTOMS' 1995 RULING

After Customs' 1994 ruling, importer Tucan International sought a ruling on the classification of such goods if the components were imported separately. *See* HQ 957413 (Mar. 31, 1995); Pomeroy Aff. ¶ 3. Pomeroy contends that the reasoning of this later Customs ruling (the "1995 Ruling") controls the case at bar.

In its 1995 Ruling, Customs determined that—imported separately—the wrought iron pedestals are classifiable as "statuettes and other ornaments, of base metal," under heading 8306, HTSUS. HQ 957413 (Mar. 31, 1995). As to the glass vessels, Customs determined that, because their rounded bottoms render them "incapable of standing, or of holding any article without the use of the wrought iron pedestals as supports," the glass vessels—imported separately—"are *a part* of the wrought iron pedestals with glass vessels." *Id*. (emphasis added). Customs concluded that the glass vessels alone could not be classified as decorative articles of glass under heading 7013, HTSUS—the classification applied in the 1994 Ruling—because that heading does not provide for *parts* of decorative glass articles. *Id.* Customs therefore ruled that—imported separately—the glass vessels are properly classified under 7020.00.00, HTSUS as "[o]ther articles of glass." *Id.*

II. STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and * * * the moving party is entitled to [ ] judgment as a matter of law." USCIT R. 56(c). Customs' classification decisions are reviewed through a two-step analysis—first construing the relevant tariff headings, then determining under which of those headings the merchandise at issue is properly classified. *Bausch & Lomb, Inc. v. United States,* 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Universal Elecs., Inc. v. United States,* 112 F.3d 488, 491 (Fed. Cir. 1997)).

Interpretation of the relevant tariff headings is a question of law, while application of the terms to the merchandise is a question of fact. *See id*. Summary judgment is thus appropriate where—as here—the nature of the merchandise is not in question, and the sole issue is its proper classification. *See Bausch & Lomb, supra* (it is "clear that summary

judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is").

On review, Customs' classification rulings are afforded a measure of deference proportional to their power to persuade, in accordance with the principles set forth in *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). *See United States v. Mead Corp.,* 533 U.S. 218, 234–35 (2001); *Mead Corp. v. United States,* 238 F.3d 1342, 1346.

III. DISCUSSION

The proper classification of all merchandise is governed by the General Rules of Interpretation ("GRIs"), which provide a framework for classification under the HTSUS, and are to applied in numerical order. *See, e.g.*, *Orlando Food Corp. v. United States,* 140 F.3d 1437, 1439 (Fed. Cir. 1998); *Baxter Healthcare Corp. v. United States,* 182 F.3d 1333, 1337 (Fed. Cir. 1997). *See generally Pillowtex Corp. v. United States,* 171 F.3d 1370, 1374–75 *et seq.* (Fed. Cir. 1995) (methodically applying the GRIs in order, in addressing a claim for classification under GRI 3(b), among other theories).

GRI 1 requires that goods be classified "according to the terms of the headings and any relevant section or chapter notes and, provided such headings or notes do not otherwise require, according to the following [GRIs 2 through 6]." GRI 1. Thus, the first step is to determine whether the headings and notes require a particular classification. In classifying the merchandise at issue here, Customs considered two competing headings—7013 and 8306.

Heading 7013, in relevant part, covers "glassware of a kind used for * * * indoor decoration or similar purposes." HTSUS, heading 7013. The merchandise at issue is used for indoor decoration, and includes a glass vessel which is used to hold a candle or other similar object such as flowers, a plant, or a bottle of wine. Since a part of the merchandise—specifically, the glass vessel—is made of glass, the merchandise *prima facie* falls under heading 7013.[4]

Heading 8306, in relevant part, covers "statuettes and other ornaments, of base metal." HTSUS, heading 8306. As the Explanatory Notes for heading 8306 indicate, that heading includes not only "wholly ornamental" articles, but also "articles whose only usefulness is to contain or support other decorative articles or to add to their decorative effect." *Harmonized Commodity Description and Coding System: Explanatory Notes* (2d ed. 1996) ("Explanatory Notes") 83.06.[5] The merchandise here consists in part of a pedestal of wrought iron (a base metal), which

[4] As indicated in note 1 above, heading 7013 expressly excludes glassware covered by headings 7010 and 7018. HTSUS, heading 7013. Heading 7010 covers, in essence, glass containers of the kinds commonly used for the conveyance or packing of products; and heading 7018 covers articles including glass beads, imitation precious or semi-precious stones, non-prosthetic glass eyes, ornaments of lamp-worked glass, and very small microspheres of glass. *See* HTSUS heading 7010; HTSUS, heading 7018. The merchandise at issue in this case cannot be classified under either of those headings. *See* Def.'s Statement of Add'l Mat. Facts ¶ 7; Plaintiff's Reply Brief at 7 (indicating parties' agreement on the facts).

[5] The Explanatory Notes function as an interpretative supplement to the HTSUS. While they "do not constitute controlling legislative history," they "are intended to clarify the scope of HTSUS subheadings and offer guidance in interpreting its subheadings." *Mita Copystar Am., Inc. v. United States,* 21 F.3d 1079, 1082 (Fed. Cir. 1994) (*citing Lynteq, Inc. v. United States,* 976 F.2d 693, 699 (Fed. Cir. 1992)).

is used to contain or support another decorative article and to add to its decorative effect. Thus, as both Pomeroy and the Government acknowledge, the merchandise is *prima facie* classifiable under heading 8306 as well. *See*, *e.g.*, Plaintiff's Reply Brief at 6–7 (heading 8306 is one of "the only two classifications to be considered" in classifying merchandise under GRI 3(b)), 11; Defendant's Brief at 9–10; Defendant's Reply Brief In Support of Motion for Summary Judgment and In Opposition to Plaintiff's Response ("Defendant's Reply Brief") at 3–4.

The relevant part of GRI 2 is GRI 2(b), which provides:

> Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. *Any reference [in a heading] to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance.* The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 2(b) (emphasis added). Therefore, according to GRI 2(b), the reference to "base metal" in heading 8306 is read expansively, to embrace articles consisting "wholly or partly" of a base metal, such as wrought iron. Similarly, heading 7013 includes the articles described therein, even if they consist only "partly" of glassware. *But see* Explanatory Note 70.13 (discussed below).

GRI 2(b) thus reaffirms that the merchandise in this case is *prima facie* classifiable under both heading 7013 and heading 8306. The merchandise is an article made in part of glass and used for indoor decoration or similar purposes. It is also an ornamental article made in part of a base metal (specifically, wrought iron). Accordingly, pursuant to the terms of GRI 1 and GRI 2, the merchandise at issue is *prima facie* classifiable both as "[g]lassware of a kind used for * * * indoor decoration or similar purposes" under heading 7013, and as "statuettes and other ornaments, of base metal" under heading 8306. *See* HTSUS, heading 7013; HTSUS, heading 8306; GRI 2(b); HTSUS, Section XV, Note 3 (stating that "base metal" includes "iron"); Explanatory Note 70.13; Explanatory Note 83.06; Def.'s Statement of Add'l Mat. Facts ¶¶ 1–3, 7; Plaintiff's Reply Brief at 7 (indicating parties' agreement on the facts).

While Pomeroy concedes that the merchandise in this case is *prima facie* classifiable under heading 8306, Pomeroy argues—albeit in another context—that classification under heading 7013 is precluded on two grounds.[6]

First, Pomeroy argues—in essence—that the merchandise cannot be classified under heading 7013 because, under Customs' 1995 Ruling, the glass vessels constitute "parts," and heading 7013 does not cover

[6] Pomeroy appears to raise both arguments *not* as objections to the merchandise's *prima facie* classification under heading 7013, but rather only in the context of the analysis under GRI 3(b), discussed below. However, the arguments are—at least in some respects—more potent as objections to *prima facie* classification under heading 7013, because (as discussed in greater detail below) analysis under GRI 3(b) is limited to consideration of those headings under which the merchandise is *prima facie* classifiable. In any event, wherever they are considered, Pomeroy's arguments are unpersuasive. *See generally* Defendant's Brief at 12–14 (addressing both arguments, in context of GRI 3(b) analysis).

parts. *See* Plaintiff's Brief at 3, 7–10; Plaintiff's Reply Brief at 5–6 (making argument in context of GRI 3(b)). But, while it is the glass vessel that implicates the potential classification of the merchandise under heading 7013, it is not the glass vessel alone that is *prima facie* classifiable under that heading. Rather, it is the article as an integral whole—the glass vessel, together with its wrought iron pedestal. The 1995 Ruling is thus irrelevant.

Pomeroy also contends that—"quite aside from the question of classification pursuant to GRI 3(b)"—the Explanatory Notes to heading 7013 preclude the classification of the merchandise at issue under that heading. *See* Plaintiff's Brief at 10–11. *See generally* Plaintiff's Reply Brief at 9–10.

The Explanatory Note in question states, in pertinent part:

> Articles of glass combined with other materials (base metal, wood, etc.), are classified in this heading *only* if the glass gives the whole the character of glass articles.

Explanatory Note 70.13 (emphasis in the original). Pomeroy asserts—at least for this purpose—that "the iron stand constitutes a substantial and essential part of the article," such that the article cannot be said to have "the character of [a] glass article[ ]." *See* Plaintiff's Brief at 10–11; Plaintiff's Reply Brief at 9–10.

Even a cursory examination of the merchandise belies Pomeroy's claim. The pedestal, while complementary to the glass vessel, is subsidiary to it in the context of the merchandise as an integral whole. The pedestal serves to elevate the glass vessel, and to hold it upright. But it is the glass vessel which is the focal point of the article, and which performs the article's overall function—holding a candle, flowers, a plant, a wine bottle, or some similar object. *See* Sample.

Moreover, as Pomeroy itself has repeatedly acknowledged (albeit in the context of the GRI 3(b) analysis, discussed below), it is the glass vessel which gives the merchandise as a whole its "essential character." *See* Plaintiff's Brief at 3, 7, 11; Plaintiff's Reply Brief at 1, 3, 10, 11. Pomeroy's concessions concerning "essential character" further undermine its argument on this point.

In short, the glass vessel gives the article as a whole the character of a glass vessel, within the meaning of Explanatory Note 70.13. Accordingly, nothing in the Explanatory Notes precludes the *prima facie* classification of the merchandise at issue under heading 7013 (in addition to heading 8306).

Because the merchandise is *prima facie* classifiable under heading 7013, it cannot be classifiable under heading 7020. Heading 7020 is a residual "basket" provision that describes a category of glassware not covered elsewhere in Chapter 70, HTSUS. Heading 7020 is therefore "trumped" by heading 7013, another heading in the same chapter which is more specific. *See*, *e.g.*, *Franklin v. United States,* 289 F.3d 1017 (Fed. Cir. 2002) (reversing classification of merchandise under basket provision, in favor of more specific tariff heading). The competing tariff provi-

sions, therefore, are headings 7013 and 8306; heading 7020 is excluded, by definition.

Where, as here, merchandise is "*prima facie* classifiable under two or more headings," classification is governed by GRI 3. GRI 3 provides:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in * * * composite goods * * *, those headings are to be regarded as equally specific * * *.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, * * * shall be classified as if they consisted of the material or component which gives them their essential character * * *.
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3.

Because the two competing headings—heading 7013 and heading 8306—each refer only to part of the composite article at issue, the exception to GRI 3(a)'s rule of "relative specificity" applies, and the two headings are deemed equally specific. Analysis therefore proceeds to GRI 3(b). GRI 3(b) and its "essential character" test are the primary focus of the parties' dispute.

In its 1994 Ruling, classifying composite merchandise virtually identical to that at issue here, Customs found that the "essential character" of the merchandise was imparted by the glass vessel. Customs reasoned that "[t]he glass vessel is the component which distinguishes the article * * * [T]he glass is the component which fulfills the function of the article; it holds the object or objects to be displayed, such as [ ] flowers, plants, wine bottles, candles, etc." HQ 956810 (Nov. 28, 1994).

So too, in this case, the "essential character" of the merchandise is imparted by the glass vessel. Accordingly, as between heading 7013 and heading 8306, Customs classified the merchandise here under heading 7013—as if the merchandise "consisted of the * * * component which gives [the composite merchandise its] essential character," under GRI 3(b).

While Pomeroy agrees that the glass vessel gives the merchandise as a whole its "essential character" (*see*, *e.g.*, Plaintiff's Brief at 3, 7, 11;

Plaintiff's Reply Brief at 1, 3, 10, 11),[7] Pomeroy fundamentally disagrees with Customs' resulting classification. Pomeroy's objections, however, are unavailing.

The gravamen of Pomeroy's complaint is that the merchandise here should be classified under the heading 7020. However, as explained above, the merchandise is *prima facie* classifiable under heading 7013, and so cannot also be classifiable under heading 7020, which is a "basket" provision.

Because the merchandise is not *prima facie* classifiable under heading 7020, that heading cannot be considered in the GRI 3(b) analysis. As evidenced by the plain language of the rule itself, analysis under GRI 3 is limited to those headings under which merchandise is *prima facie* classifiable. *See* Defendant's Reply Brief at 4–5 (*citing Pillowtex Corp. v. United States,* 171 F.3d 1370 (Fed. Cir. 1999)).

Specifically, GRI 3(a), (b) and (c) are subordinate to the introductory language of GRI 3, which prefaces and limits the subsections that follow it. Thus, for example, GRI 3(a)'s pointed references to "the heading," "headings," and "those headings" clearly refer back to the phrase "under two or more headings" in the introductory language of GRI 3. Similarly, GRI 3(c)'s reference to "heading" also relates back to the introductory language of GRI 3. While GRI 3(b) does not refer explicitly to the terms "heading" or "headings," GRI 3(b) must be read *in pari materia* with the introductory language of GRI 3, as well as the language of its corresponding subsections—GRI 3(a) and GRI 3(b). GRI 3(b)'s references to GRI 3(a) and the terms "material" and "component" reflect a clear intent to follow in GRI 3(b) the same scheme embodied in GRI 3(a) and 3(c)—that is, to consider only those headings under which the goods at issue are *prima facie* classifiable.[8] *See* Defendant's Reply Brief at 4 n.8.

Moreover, reading GRI 3(b) so as to limit the headings considered to those two or more competing headings under which the goods are *prima facie* classifiable is the only construction of GRI 3(b) which harmonizes GRI 3 with GRI 1. If an article were classifiable under some heading other than one under which it is *prima facie* classifiable, that classification would violate GRI 1, the paramount principle in the proper classification of goods. *See* Defendant's Reply Brief at 5.

Pomeroy's failure to establish that the merchandise here is *prima facie* classifiable under heading 7020 is fatal to its case, and obviates any need to reach its various arguments under GRI 3(b). They are, in any event, lacking in merit.

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[7] On the penultimate page of its reply brief, Pomeroy seeks to hedge a bit on its oft-repeated admission that it is the glass vessel which imparts its "essential character" to the merchandise at issue. *See* Plaintiff's Reply Brief at 10. Pomeroy hems that, while it agrees that the glass vessel provides the "essential character" to the merchandise, it is "of the opinion" that the pedestal "could just as well" be considered to do so. *Id*. *But see* Defendant's Reply Brief at 5 n.10. Pomeroy's eleventh-hour equivocation aside, the merchandise speaks for itself. *See* Sample. For all the reasons set forth in Customs' 1994 Ruling and summarized above, the "essential character" of the merchandise is derived not from the pedestal, but from the glass vessel.

[8] Significantly, Pomeroy has pointed to no case in which goods have been classified pursuant to GRI 3(b) under some heading other than one of the headings under which the goods were *prima facie* classifiable.

Invoking Customs' 1995 Ruling, Pomeroy argues—in a nutshell—that, under GRI 3(b), "[i]f the essential character of the article is imparted by the glass vessel, then it is the classification of the glass vessel alone which will determine the classification of the imported article." Plaintiff's Reply Brief at 5. Pomeroy notes that the "essential character" of the merchandise here is imparted by the glass vessel, and emphasizes that—under Customs' 1995 Ruling—the glass vessel, imported alone, is classified under heading 7020 rather than heading 7013 (which Customs rejected because it does not cover "parts"). *See*, *e.g.*, Plaintiff's Brief at 3, 9–10. Pomeroy therefore concludes that GRI 3(b) mandates that the composite merchandise here at issue be classified under heading 7020 as well.

But, again, Pomeroy's reliance on the 1995 Ruling is misplaced. The fact that heading 7013 does not expressly provide for parts of glassware is irrelevant because—for purposes of classifying the composite articles here at issue under GRI 3(b)—the glass vessels are not "parts" but, rather, "components" (and, in fact, the components which impart to the composite articles their "essential character").[9]

In effect, GRI 3(b) creates a "legal fiction" in which a composite article is classified as if it consists wholly of the component which imparts the overall good with its "essential character." *See* Defendant's Brief at 13–14 (*citing Better Home Plastics Corp. v. United States,* 20 CIT 221, 226, 916 F. Supp. 1265, 1268 (1996), *aff'd*, 119 F.3d 969 (Fed. Cir. 1997)). But that does not mean, as Pomeroy contends, that the composite article is classified the same as one of its parts imported separately. Indeed, to the contrary, because—under GRI 3(b)—a composite article as a whole is considered for classification purposes to be made up entirely of one of its components, that component cannot then logically be considered a "part" of the composite article. Under the "legal fiction" of GRI 3(b), the component, in effect, *is* the composite article. *See* Defendant's Brief at 13–14; *see also* Defendant's Reply Brief at 6–7.

It is similarly irrelevant that the glass vessels, when imported alone, are classified under heading 7020 (essentially as replacement "parts" for the composite articles classified under 7013). A separately-imported glass vessel plainly is not a composite article within the meaning of the statute. Thus, in contrast to the composite article in the case at bar, the separately-imported glass vessel cannot be classified under GRI 3(b) as if it constituted the whole of a heading 7013 glass article. *See generally* Defendant's Brief at 14.

Pomeroy apparently would read GRI 3(b) to require that a composite article must *in every case* be classified the same as one of its component parts *imported separately.* But that ignores a fundamental tenet of customs law. It is well established that, for tariff purposes, merchandise is to be classified in the condition in which it is imported. *See United States*

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[9] Pomeroy's other argument concerning heading 7013—its claim that the Explanatory Notes to that heading preclude classification of the merchandise under heading 7013—is addressed above, in the context of GRI 1 and GRI 2(b). The rationale outlined there applies with equal force, whether Pomeroy's argument is considered under GRI 1 and GRI 2(b), or under GRI 3(b). Accordingly, it is not repeated here.

v. Citroen, 223 U.S. 407 (1912). And the merchandise here at issue is a composite article consisting of both a wrought iron pedestal and a glass vessel—not a glass vessel alone.

The same tenet of customs law disposes of Pomeroy's argument concerning disparate treatment. In an effort to support its position, Pomeroy points out that Customs' classification of the composite merchandise here at issue renders it dutiable, even though the two components—imported separately—are duty-free. *See* Plaintiff's Reply Brief at 7–8. However, noting that "[a]n item must be evaluated for tariff purposes in its condition as imported," the Court of Appeals has held that, under circumstances such as these, the classification system must be enforced as enacted by Congress, no matter how anomalous the result. *Rollerblade, Inc. v. United States,* 112 F.3d 481, 487–88 (Fed. Cir.1997) (involving case of "tariff inversion," upholding imposition of tariffs on importation of in-line skate boots, even though boots with skates already attached could be imported duty-free, putting companies assembling goods in the U.S. at a competitive disadvantage) (*quoting Simod Am. Corp. v. United States,* 872 F.2d 1572, 1577 (Fed. Cir. 1989)).

Pomeroy also accuses the Government of misreading GRI 3(b) by "mix[ing] up" the references to "material" and "component" in that provision. *See generally* Plaintiff's Brief at 5; Plaintiff's Reply Brief at 4, 7. Pomeroy attempts to parse the language of GRI 3(b), in an effort to support its central thesis—that the reference in the GRI to the "component" giving the overall merchandise its "essential character" means that composite goods should be classified as that component would be classified if the component were imported alone. *See* Plaintiff's Reply Brief at 3–4. In essence, Pomeroy's proposed reading would split GRI 3(b) into two rules: (1) *mixtures* would be classified as if the good consisted of the *material* that imparts the good's essential character; and (2) *composite goods* would be classified as if they consisted of the *component* that imparts the good's essential character. *See* Plaintiff's Reply Brief at 4.

But Pomeroy's effort to "diagram" GRI 3(b) is ill-conceived. As an initial matter, while Pomeroy's strained interpretation purports to explain the application of GRI 3(b) to both mixtures and composite goods, GRI 3(b) also addresses the classification of "goods put up in sets for retail sale." *See* GRI 3(b). By arguing that GRI 3(b)'s reference to "materials" relates only to the classification of mixtures, and that the reference to "components" relates only to composite goods, Pomeroy is left with no corresponding term in GRI 3(b) which would relate to (and govern the classification of) goods put up in sets for retail sale. Although Pomeroy conveniently seeks to dismiss "the question of sets" as "not applicable here" (*see* Plaintiff's Reply Brief at 4), the omission is evidence of Pomeroy's flawed logic.

Moreover, as the Government notes, the language of GRI 3(a) contradicts Pomeroy's position. GRI 3(a) expressly refers to "the *materials* or substances contained in mixed or composite goods." *See* Defendant's

Reply Brief at 5 n.9 (*referring* to GRI 3(a), emphasis added). (Indeed, while GRI 3(a) speaks of composite goods, it does not even mention the term "component"—the term which Pomeroy associates with composite goods in its asserted interpretation of GRI 3(b), discussed above.) Pomeroy's interpretation is further undercut by the sentence structure of GRI 3(b), which refers to "composite goods *consisting of different materials* or made up of different components." *See* Defendant's Reply Brief at 5 n.9 (*referring to* text of GRI 3(b), emphasis added). That language too plainly demonstrates that composite goods can consist of different *materials*, as well as different components. To the same effect is the Explanatory Note for GRI 3(b), which specifically refers to composite goods as consisting of different *materials* and different components. *See* Defendant's Reply Brief at 5 n.9 *(referring to* Explanatory Notes at GRI 3(b)). *See also Mita Copystar Am. v. United States,* 160 F.3d 710, 712 (Fed. Cir. 1998) (GRI 3(b) "directs that composite goods made up of different components should be classified as though they consisted of the *material* or component that gives them their 'essential character' ") (emphasis added).

In sum, like its other arguments for classification under heading 7020, Pomeroy's attempts to parse the language of GRI 3(b) are simply unpersuasive.

IV. CONCLUSION

Applying GRI 3(b), Customs properly classified the merchandise at issue as "[g]lassware of a kind used for * * * indoor decoration or similar purposes," under subheading MX7013.99.90, HTSUS. Pomeroy's motion for summary judgment is therefore denied, and the Government's cross-motion is granted.

Judgment will be entered accordingly.

(Slip Op. 02–58)

DOLLY, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 98–04–00677

[Upon consideration of Plaintiff's motion for summary judgment pursuant to CIT Rule 56, Defendant's cross-motion for summary judgment, Plaintiff's response to Defendant's cross-motion for summary judgment, and Defendant's reply to Plaintiff's opposition to Defendant's cross-motion for summary judgment, Plaintiff's motion and Defendant's cross-motion for summary judgment are denied. Plaintiff's motion for oral argument is also denied.]

(Dated June 20, 2002)

Neville Peterson LLP (Arthur K. Purcell, John M. Peterson, Curtis W. Knauss), Washington, D.C., for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *James A. Curley,* Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for Defendant.

OPINION

CARMAN, *Chief Judge:* Pursuant to 28 U.S.C. § 1581(a) (2000), this Court has jurisdiction to consider the cross-motions for summary judgment that Dolly, Inc. (Plaintiff) and the United States (Defendant) have brought before it in accordance with Rule 56 of the Rules of the United States Court of International Trade. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R.56(c). Because the parties' dispute over the proper description of the subject merchandise presents a genuine issue as to a material fact, Plaintiff's motion and Defendant's cross-motion for summary judgment are denied.

BACKGROUND

Plaintiff imported subject merchandise during 1997 at the Port of Dayton, Ohio where the Department of Customs ("Customs") classified the subject merchandise under subheading 4202.92 of the Harmonized Tariff Schedule of the United States (HTSUS). (Pl.'s Statement of Material Facts not in Dispute ¶¶ 1, 3 ("Pl.'s Statement")); (Def.'s Resp. to Pl.'s Statement of Material Facts not in Dispute ¶ 1 ("Def.'s Resp.").) HTSUS subheading 4202.92 covers

> [t]runks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcan-

> ized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: * * *

Accordingly, Customs assessed a tariff of around 20 percent *ad valorem*. (Complaint ¶ 8.)

Plaintiff protested Customs' classification of the subject merchandise, asserting Customs should instead have classified the merchandise under HTSUS subheading 3924.10.50, which provides for "Tableware, kitchenware, other household articles and toilet articles, of plastics: * * * Other." The corresponding duty rate is 3.4 percent *ad valorem*. (Pl.'s Statement ¶¶ 2–4); (Def.'s Resp. ¶¶ 2–4.)

Customs denied Plaintiff's protest on the subject entries. All liquidated damages, charges and exactions for the subject entries were paid prior to the commencement of this action, and Plaintiff timely filed the Summons for this action. (Pl.'s Statement ¶¶ 5–6); (Def.'s Resp. ¶¶ 5–6.)

Plaintiff moves and Defendant cross moves for summary judgment. In Plaintiff's Statement of Material Facts not in Dispute, Plaintiff states, "The merchandise which is the subject of this action consists of various styles of bottle tote bags * * *." (Pl.'s Statement ¶ 1.) Defendant, however, "[d]enies that the subject bags are properly described as bottle tote bags and avers that they are diaper bags." (Def.'s Resp. ¶ 1.)

PARTIES' CONTENTIONS

I. Plaintiff's Contentions

Plaintiff asserts the subject merchandise consists of "plastic containers for foodstuffs [like] the exemplars listed under subheading 3924.10" and is "used for the storage and preservation of food and beverages as contemplated by Heading 3924." (Pl. Mot. Summ. J., at 11–12.) Plaintiff claims the subject merchandise was "designed, manufactured and marketed to be used for the preservation and storage of infant bottles and food" and refers to various details of the merchandise's design, manufacture, and marketing to support its claim. *Id*., at 12–15.

Plaintiff argues the subject merchandise is not classifiable under heading 4202 because the exemplars for that heading are not designed or marketed to carry food or beverages even though they could be used for such purposes. *Id*., at 15.

Plaintiff also argues that appellate precedent supports its claim that the subject merchandise is properly classifiable under heading 3924 rather than heading 4202, citing *Sports Graphics, Inc. v. United States,* 24 F.3d 1390 (1994) and *SGI, Inc. v. United States,* 122 F.3d 1468 (Fed. Cir. 1997). Plaintiff claims the imported articles involved in those cases are "substantially identical" to the subject merchandise involved in the instant case. *Id*., at 17.

Finally, Plaintiff states that even if HTSUS heading 4202 describes the subject merchandise, heading 3924, as a use provision, is more spe-

cific than the *eo nomine*[1] provision of heading 4202. Therefore Plaintiff asserts that pursuant to the rule of "relative specificity," heading 3924 should govern. *Id*., at 22–23, citing General Rule of Interpretation 3(a).

II. Defendant's Contentions

Defendant asserts a statutory presumption of correctness applies to every subsidiary fact necessary to support a classification decision by the Department of Customs. (Def. Br. in Opp. to Pl. Mot. Summ. J, at 3.) Defendant states therefore that Plaintiff has failed to overcome by a preponderance of the evidence the presumption that the subject merchandise is similar to the exemplars specified in heading 4202 and/or subheading 4202.92.45. *Id*., at 5. In order to establish that the subject merchandise is properly classifiable under subheading 3924.10.50, a "principal use" provision, and not under heading 4202, Defendant states Plaintiff must "establish that the class or kind of merchandise to which the imports belong is principally used with 'food and beverages.'" *Id*., citing Additional Rule 1(a). Defendant argues not only that Plaintiff has failed even to establish the class or kind of merchandise to which the subject merchandise belongs but that Plaintiff's own advertising literature and other documentation support Commerce's classification. *Id*., at 6. At most, Defendant asserts, Dolly has raised triable issues of material facts precluding summary judgment in its favor. *Id*.

ANALYSIS

A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A disputed fact is material if it could affect the suit's outcome under the governing law. *Id*. In this case, the parties' dispute as to whether the subject merchandise is properly described as a "bottle tote bag" or a "diaper bag" constitutes a genuine dispute as to a material fact.

The factual dispute is genuine because a reasonable fact finder could return a verdict for each nonmoving party in this case, finding that either "bottle tote bag" or "diaper bag" best describes the subject merchandise. Plaintiff labels the subject merchandise a bottle bag because Plaintiff claims the design and construction of the merchandise show it was produced to store and preserve infant beverages and food stuff. For instance, Plaintiff points to the four bottle loops that, if filled and combined with an ice pack, would leave little room for other articles. (Pl. Mot. Summ. J., at 12.) Plaintiff also points to the insulated construction of the containers as a means to maintain the temperature of food or beverages. *Id*. Plaintiff states that although it has used the term "diaper bag" to describe the subject merchandise, it has done so only in a generic sense because the subject merchandise fits into Dolly's product line for articles with related uses. *Id.,* at 16.

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[1] An *eo nomine* provision describes a "commodity by a specific name, usually one well known to commerce." BLACK'S LAW DICTIONARY 535 (6th ed. 1990).

In support of its claim that the subject merchandise is part of a class or kind of bags known as diaper bags, Defendant counters that Plaintiff acknowledged in discovery that bottles would take up only 25 to 50 percent of the space inside each container. (Def. Br. in Opp. to Pl. Mot. Summ. J., at 12–13.) Defendant also states that Plaintiff has provided no evidence regarding the type or amount of insulation or that the bags actually keep milk at a proper temperature over time. *Id.*, at 14. Defendant also posits that many of the bags are not airtight. *Id.*

As further evidence that the bags are best described as "diaper bags," Defendant points to Plaintiff's own descriptions of the merchandise. Defendant demonstrates that in commercial invoices, packing lists and country declarations, Plaintiff has referred to the subject merchandise as "diaper bags" or "minis." *Id.*, at 15. Defendant also points to Plaintiff's price lists that refer to certain styles of the subject merchandise as "Disney Babies Diaper Bags," "Winnie-the Pooh Diaper Bags," "Dolly's Own Diaper Bags" or "Dolly's Baby Baggage." *Id.* In addition, Defendant states that six of the styles at issue have specification sheets entitled "Diaper Bag Specifications." *Id.*, at 15–16. Finally, Defendant states the promotional literature for each style at issue refers to the subject merchandise as "diaper bags." *Id.*, at 16.

Because a reasonable fact finder could find the best description of the subject merchandise to be either "bottle tote bag" or "diaper bag," this Court finds the factual dispute to be genuine.

The factual dispute is also material because it could affect the suit's outcome under the governing law. Characterizing the subject merchandise as either a bottle tote bag or as a diaper bag would have a direct effect upon the principal use that Plaintiff would be required to prove in order to demonstrate that the subject merchandise is properly classifiable under HTSUS subheading 3924.10.50.

Further findings of fact are required to determine if the subject merchandise is a bottle tote bag or a diaper bag. Therefore, the parties' motions for summary judgment are denied. In addition, Plaintiff's motion for oral argument in this action is denied.

(Slip Op. 02–59)

CO-STEEL RARITAN, INC., GS INDUSTRIES, KEYSTONE CONSOLIDATED INDUSTRIES, INC., AND NORTH STAR STEEL TEXAS, INC., PLAINTIFFS *v.* U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT, AND ALEXANDRIA NATIONAL IRON AND STEEL CO. AND SIDERURGICA DEL ORINOCO, C.A., INTERVENOR-DEFENDANTS

Court No. 01–00955

[Plaintiffs' motion for judgment on the agency record denied in part and granted in part; remanded to the International Trade Commission.]

(Decided June 20, 2002)

Collier Shannon Scott, PLLC (Paul C. Rosenthal, Kathleen W. Cannon, R. Alan Luberda and *John M. Herrmann)* for the plaintiffs.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, and *Karen Veninga Driscoll,* Attorney, United States International Trade Commission, for the defendant.

Baker & McKenzie (Kevin M. O'Brien, Thomas Peele and *Kristi K. Hansen)* for intervenor-defendant Alexandria National Iron and Steel Company.

White & Case LLP (David P. Houlihan, Lyle B. Vander Schaaf, Frank H. Morgan, Joseph H. Heckendorn and *Jonathon Seiger)* for intervenor-defendant Siderurgica del Orinoco, C.A.

OPINION AND ORDER

AQUILINO, *Judge:* In this action, duly commenced pursuant to 19 U.S.C. §1516a(a)(1)(C) and 28 U.S.C. §1581(c), the plaintiffs seek judicial review and reversal of the (preliminary) determination of the International Trade Commission ("ITC") that imports of carbon and certain alloy steel wire rod from Egypt, South Africa and Venezuela that are alleged to be sold in the United States at less than fair value are negligible and therefore that its investigations with regard to those countries be terminated. *See* Int'l Trade Comm'n, *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela,* 66 Fed.Reg. 54,539 (Oct. 29, 2001).

The only cause of action pleaded in plaintiffs' complaint is that this termination is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 19 U.S.C. §1516a(b)(1)(A). And they have served and filed a motion pursuant to CIT Rule 56.2 for judgment upon the record compiled by the Commission, arguing, among other things, (i) that its reliance upon data that were not available to them preceding the filing of their petition was unlawful; (ii) that the ITC's conclusion that certain imports in question did not exceed in the aggregate seven percent of all imports during the period of investigation selected was erroneous; and (iii) that its determination that imports from Egypt, South Africa and Venezuela would not imminently exceed the statutory negligibility thresholds was arbitrary and capricious.

I

The above-named plaintiffs claim to be domestic producers of the merchandise that is allegedly being imported into the United States at less than fair value and which filed petitions for relief therefrom with the International Trade Administration, U.S. Department of Commerce ("ITA") and with the ITC. They were filed on August 31, 2001, and drew upon available industry data for the period July 2000 through June 2001. The effective date for initiation of the Commission's preliminary investigation was thus reported to be August 31st. *See, e.g.,* Int'l Trade Comm'n, *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela,* 66 Fed.Reg. 47,036, 47,037 (Sept. 10, 2001). And, to

> evaluate negligibility, [the ITC] considered official Commerce import statistics for the period August 2000 through July 2001.[37] * * *
>
> * * * * * * *
>
> [37] * * * [T]he Commission has interpreted the statutory provision regarding the time period that [it] should examine for negligibility purposes to end with the last full month prior to the month in which the petition is filed, if those data are available.

Int'l Trade Comm'n, *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela,* USITC Pub. 3456, p. 8 (Oct. 2001). When those data proved available, the commissioners took this stated approach—over the protest of the petitioners, which urged the ITC to examine imports from July 2000 to June 2001, the period that was the basis of their petitions. *See id.,* n. 37. That issue is raised anew by them now herein.

The plaintiffs argue that the data for July 2001 only became available after the petitions had been filed and thus that the Commission's reliance thereon was not in accordance with law. They point to the following provision in the Trade Agreements Act of 1979, as amended:

> **(24) Negligible imports**
>
> **(A) In general**
>
> **(i) Less than 3 percent**
>
> Except as provided in clauses (ii) and (iv), imports from a country of merchandise corresponding to a domestic like product identified by the Commission are "negligible" if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes—
>
> **(I)** the filing of the petition under section 1671a(b) or 1673a(b) of this title * * *.

19 U.S.C. §1677(24).

On its face, this legislation is neither ambiguous nor executory. Nonetheless, the plaintiffs press their position that the ITC "alter[ed]" their timeframe and, in doing so, "reached different conclusions on negligibility from those set forth in the petition." Plaintiffs' Brief, p. 20.

> In essence, the question for this court comes down to whether the statutory language referring to "the most recent 12-month period for which data are available that precedes the filing of the petition" means the most recent 12-month period "for which data are available" to the domestic industry *preceding* the filing of the petition, or "for which data are available" to the Commission *subsequent* to the filing of the petition, so long as the 12-months of data themselves precede the filing.

Id. at 22 (emphasis in original). Or, as they articulate elsewhere in their excellent brief,

> the question presented here [is] whether the statutory reference to reliance on data available preceding the filing of the petition permits the Commission to examine data that was [*sic*] not available preceding the filing of the petition.

Id. at 24. In attempting to resolve the controlling question, however couched, the court accepts plaintiffs' contentions that the statutory requirement that the negligibility calculation be premised on data available preceding the filing of a petition is a logical means of requiring petitioners to ensure that the countries considered as targets for antidumping relief actually surpass the statutory minimum(s) before they are formally charged[1]; that, typically, the most recent data that are available prior to filing will not be for the twelve months immediately preceding that moment, rather for a 12-month period slightly older in time[2]; that a domestic U.S. industry must determine in good faith whether to include certain countries in any petition for relief from injurious dumping[3]; that such an industry can only base its allegations in a petition on data that are available before its filing, "not on speculation as to possible shifts in imports that might occur subsequently"[4]; and that, under article 5.8 of the Uruguay Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade[5], negligibility was contemplated as a threshold determination to the initiation of a government investigation.[6]

On the other hand, the court cannot concur with other representations by the plaintiffs, including

> [h]ad Congress wanted the Commission to rely on the most recent 12-month period prior to the filing of the petition, as the Commis-

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[1] *See* Plaintiffs' Brief, p. 19.
[2] *See id.,* n. 6.
[3] *Cf. id.* at 20, 23.
[4] *Id.* at 23.
[5] April 15, 1994. *See* H.R. Doc. No. 103–316, vol. 1, p. 1460 (1994).
[6] Plaintiffs' Brief, p. 21.

> sion has interpreted this statutory passage, it would not have included the phrase "for which data are available"[7],

and "[t]he Commission's reading of this provision renders th[at] phrase * * * surplusage"[8], and,

> [b]y interpreting the statute as it has, the Commission has effectively required domestic industries to engage in conjecture as to what shifts in imports might occur in the month or two for which data are unavailable at the time the petition is filed, but which the Commission may later rely upon to reach its negligibility decision. Under this approach, the domestic industry must undertake a speculative filing to the extent it is suffering problems from imports with small but, collectively, injurious and fluctuating volumes. Rather than requiring the domestic industry to assess negligibility based on actual data available to it when the petition is filed, the Commission's interpretation of the statute would promote speculation and risk-taking by domestic producers about whether certain countries would or would not be found to surpass negligibility thresholds with the addition of future import statistics.[9]

Obviously, this slant is too severe. The statute neither promotes speculation and risk-taking by domestic producers nor permits such an approach by the ITC. Once a petition gets filed, presumably in good faith, the burden to assess the salient facts shifts to the Commission. That process does take some days, during which the plaintiffs concede that data for a period closer to a petition's moment of filing may become available in regular course[10] to the ITC. This is the case at bar, and nothing other than argument by the plaintiffs stands in the way of reference to such data. The statute quoted above does not preclude it, nor is there a showing of a contrary intent on the part of Congress. Indeed, the antecedent (or subject) of the verb "precedes" is singular, not "data", presuming the legislature like this court is committed to the concept that that noun is the plural of Latin-derived *datum* and therefore could not and did not dictate the foregoing, adopted conjugation. Moreover, plaintiffs' thesis does not explain away the legislated inclusion of "most recent".

Hence, the ITC's statutory responsibility, triggered by plaintiffs' petition, was to determine whether or not imports from any of the countries targeted were "negligible" for a 12-month period[11] before August 31, 2001. In other words, the focus of 19 U.S.C. §1677(24)(A)(i) *et seq.* is not on the Commission, rather on the most recent year's worth of available data. The ITC reports, USITC Pub. 3456, p. 8, n. 37, that its approach herein was following *Large Newspaper Printing Presses and Components Thereof from Germany and Japan,* USITC Pub. 2988, p. 23, n. 157 (Aug. 1996) ("since the statute indicates that the period to be used is the

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[7] *Id.* at 22.

[8] *Id.*

[9] *Id.* at 23–24.

[10] *Cf. id.* at 19, n. 6.

[11] The record does not confirm that data younger than July 31, 2001 were actually available when the ITC rendered its determination now at bar. *Cf. id.*

twelve-month period preceding the filing of the petition, it is reasonable to conclude that the language of the statute suggests that the 12 month period should end with the last full month prior to the month in which the petition is filed"), and *Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine,* USITC Pub. 3381, p. 7, n. 38 (Jan. 2001) ("The data we have used * * * are the most recent and accurate data available for a 12-month period preceding the filing of the petition"), as well as *Steel Authority of India, Ltd. v. United States,* 25 CIT ____, 146 F.Supp.2d 900 (2001). But, as the plaintiffs properly point out herein, this last matter did not answer their controlling question, *supra,* only that the Commission correctly rejected a demand therein that it consider data available for months *after* the date of that underlying petition's filing. *Compare* Plaintiffs' Brief, p. 24 *with* 25 CIT at ____, 146 F.Supp.2d at 909–10.

Be these references as they may, this court cannot conclude in this action that the ITC's analysis of the issue of negligibility via data that became available in regular course for a 12-month pre-petition period one month younger than that relied upon by the petitioner-plaintiffs was not in accordance with law.

II

Plaintiffs' counsel are astute observers of the shifting sands of international trade, and they well know that a lawful advance of even one month in time can alter their equation for relief. Nonetheless, they take the position that the Commission's determination for the period it selected was erroneous, in particular because it did not properly account for imports from Germany. That is, the ITC (a) overlooked data revisions of respondents from that country and (b) refused to consider the impact of a request by the petitioners that certain steel-wire products not be included in the ITA investigation[12].

The general rule for the Commission has been that it determine, preliminarily within 45 days of a petition's filing, whether there is a "reasonable indication" that an industry in the United States is materially injured, or is threatened with material injury, by reason of imports of the subject merchandise and that those imports are not negligible. 19 U.S.C. §1673b(a). And the Court of Appeals for the Federal Circuit has long denied that

> the statutory phrase "reasonable indication" means the same as a mere "possibility", or that it suggests "only the barest clues or signs needed to justify further inquiry." The statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry.

[12] The plaintiffs also claim that Indonesia had been part of their equation on negligibility but that imports from that country became a nonfactor as a result of the one-month shift. *See* Plaintiffs' Brief, p. 20.

American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed.Cir. 1986). Hence, that court has construed this court's standard for review as follows:

> Since the enactment of the 1974 [Trade] Act, ITC has consistently viewed the statutory "reasonable indication" standard as one requiring that it issue a negative determination * * * only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation. That view, involving a process of weighing the evidence but under guidelines requiring clear and convincing evidence of "*no* reasonable indication", and no likelihood of later contrary evidence, provides fully adequate protection against unwarranted terminations. Indeed, those guidelines weight the scales in favor of affirmative and against negative determinations. Under the appropriate standard of judicial review, ITC's longstanding practice must be viewed as permissible within the statutory framework.

Id. (emphasis in original). And the Commission claims to continue to adhere to this approach today. *See, e.g.,* Memorandum of Defendant USITC [herein] *passim*. *Cf. Torrington Co. v. United States,* 16 CIT 220, 790 F.Supp. 1161 (1992), *aff'd,* 991 F.2d 809 (Fed.Cir. 1993); *Ranchers-Cattlemen Action Legal Foundation v. United States,* 23 CIT 861, 74 F.Supp.2d 1353 (1999), *appeal docketed,* No. 00–1186 (Fed.Cir. Feb. 3, 2000). *Compare also Usinor Industeel, S.A. v. United States,* 26 CIT ____, ____, Slip Op. 02–39, p. 25 (April 29, 2002)(the ITC "must apply the common meaning of 'likely'—that is, *probable*—in conducting * * * sunset review analyses")(emphasis in original). Nor do the plaintiffs press for a different standard in this action. *See, e.g.,* Plaintiffs' Brief, p. 15; Plaintiffs' Reply Brief *passim*. Indeed, the Statement of Administrative Action ("SAA") promulgated in conjunction with passage of the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994), is also in accord with this approach. *See* H.R. Doc. No. 103–316, vol. 1, p. 857 (1994).

Notwithstanding this general concurrence, the memorandum of law filed by the defendant in this action has precipitated a response by the plaintiffs that the

> most fundamental and pervasive flaw evidenced by the Commission's attempted defense of its negligibility analysis is its mischaracterization of, and failure to apply properly, the standard of review applicable to a negligibility determination. While acknowledging that "[i]t has long been established that in applying the statutory standard for making a preliminary determination regarding material injury or threat of material injury, *American Lamb* provides the evidentiary standard" * * *, the [ITC]'s arguments misapply the *American Lamb* standard * * * and focus instead on assertions that its negligibility decision must be sustained because it was "reasonable" * * *.

Plaintiffs' Reply Brief, p. 1 (citations omitted).

A

The gist of plaintiffs' initial disagreement with respect to Germany was that the ITC did not pay attention to the written responses to their petition on behalf of producers of subject merchandise in that country and that that disregard "has been devastating in this case." Plaintiffs' Brief, p. 29. That is, if the

> Commission, in a final investigation, finds that imports from Germany in the August 2000–July 2001 period are [negligible], it will terminate the German investigation at that time because it will no longer have other countries * * * with which to aggregate German imports. On the other hand, had the [ITC] faithfully applied the standard established in *American Lamb,* it would have continued all of these investigations, finding that it could not say there was no likelihood that additional evidence contrary to its preliminary conclusions would arise in a final investigation on the issue of negligibility. The Commission's failure to properly apply the *American Lamb* standard on this issue justifies a reversal of [it]s negligibility decision.

Id. at 29–30.

Plaintiffs' petitions were predicated upon Commerce Department data. Not surprisingly, German respondents thereto sought to downplay the numbers attributed to them. Irrespective of that attempt, the defendant points out that its staff report explains that the official Commerce Department statistics it relied on were based on imports under certain Harmonized Tariff Schedule subheadings not including the one (7213.99.0060) in the petition which was contested by the German respondents. Hence,

> [n]o further explanation was necessary, particularly when German Respondent[s] acknowledged at the staff conference that "the tariff categories that are being used to calculate total imports are different than the ones that were alleged [by] the Petitioners."[13]

B

The plaintiffs also complain that the Commission refused to consider the impact of their request that the ITA modify the scope of its investigation, whereupon they argue that it

> failed to apply the standard of review set forth in *American Lamb* and in the SAA. The *American Lamb* standard requires a finding that "no likelihood exists that any contrary evidence will arise in a final investigation." * * * Here, the [ITC] was presented with affirmative evidence that an amendment to the scope of the case had been requested and that such an amendment would directly affect the negligibility calculation. Even if the Commission did not believe that the evidence presented by petitioners was sufficient to justify relying on that evidence as dispositive of the issue, at a minimum it [was] prevented * * * from concluding that "no likelihood" exists

[13] Memorandum of Defendant USITC, p. 31 (footnote omitted). The plaintiffs now accept defendant's position on this particular issue. *See* Plaintiffs' Reply Brief, p. 9, n. 9.

> that evidence contrary to its negligibility conclusion would arise in a final investigation.
>
> The SAA makes clear that Congress did not expect the [ITC] to terminate a case at the preliminary stage of investigation on grounds of negligibility where information obtained in the final investigation could show that imports exceed the negligibility threshold. * * * The SAA specifically admonishes the Commission not to terminate a case where there is any uncertainty regarding like product designations that might lead to a different negligibility finding in a final analysis.

Plaintiffs' Brief, pp. 31–32 (citations omitted). *See also* Plaintiff's Reply Brief, pp. 8–18.

As indicated above, the ITC had 45 days to reach its preliminary determination. Plaintiffs' petitions were filed on August 31, 2001. Their letter request to the ITA[14] was forwarded on October 9, 2001, by which date counsel were constrained to "apologize"[15] for its timing. Indeed, not surprisingly, the ITA did not resolve that request prior to the Commission's statutory deadline. Hence, the latter was left to consider the matter on the run, and notwithstanding its stated recognition that the ITC "must defer to Commerce's definition of the scope of investigation." Memorandum of Defendant USITC, p. 34, citing *USEC, Inc. v. United States,* 25 CIT ____, 132 F.Supp.2d 1 (2001); *Algoma Steel Corp. v. United States,* 12 CIT 518, 688 F.Supp. 639 (1988), *aff'd,* 865 F.2d 240 (Fed.Cir.), *cert. denied,* 492 U.S. 919 (1989); *Mitsubishi Electric Corp. v. United States,* 898 F.2d 1577 (Fed.Cir. 1990).

The Commission was also left to consider the matter upon a representation in the October 9th transmittal letter that the "only record evidence that exists is petitioners' good faith estimate, based on their market knowledge and discussion with industry participants". PubDoc 50, p. 5. That is, evidence would have to be collected for the final determination. *See id.* The commissioners apparently were unwilling to speculate as to where any such evidence might lead. Indeed, as enacted by Congress and interpreted by the courts, the law disfavors speculation and conjecture[16], but it also does favor affirmative preliminary determinations of material injury or the threat thereof.

The record indicates that the ITC gave some consideration as to whether the ITA might grant the petitioners' proposed amendment but found that it was based upon end-use analysis[17] and thus accepted their own admission therein of the ITA's "general reluctance to use end-use to define scope coverage because of inherent enforcement difficulties and prior experiences with end-use certification procedures." PubDoc 50, Attachment, p. 4. *See* USITC Pub. 3456, p. 9, n. 41.

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[14] Public Document ("PubDoc") 50, Attachment.

[15] PubDoc 50, p. 1. *See also id.* at 6.

[16] *See, e.g.,* 19 U.S.C. §1677(7)(F)(ii); H.R. Doc. No. 103–316, vol. 1, p. 855; *American Lamb Co. v. United States,* 785 F.2d 994, 1001 (Fed.Cir. 1986).

[17] *See generally* PubDoc 50, Attachment.

(1)

Any imports during the above-affirmed period of investigation from Germany (or any other country named in the petition(s)) that were indeed "negligible", as defined in general by 19 U.S.C. §1677(24)(A)(i), *supra,* engendered Commission consideration of them under the statutory exception to the general rule, to wit:

> Imports that would otherwise be negligible under clause (i) shall not be negligible if the aggregate volume of imports of the merchandise from all countries described in clause (i) with respect to which investigations were initiated on the same day exceeds 7 percent of the volume of all such merchandise imported into the United States during the applicable 12-month period.

19 U.S.C. §1677(24)(A)(ii). And those imports facilitated plaintiffs' equation pursuant to this subsection. Furthermore, the statute provides:

> **(iii) Determination of aggregate volume**
> In determining aggregate volume under clause (ii) or (iv), the Commission shall not consider imports from any country specified in paragraph (7)(G)(ii).[18]
>
> **(iv) Negligibility in threat analysis**
> Notwithstanding clauses (i) and (ii), the Commission shall not treat imports as negligible if it determines that there is potential that imports from a country described in clause (i) will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States, or that the aggregate volumes of imports from all countries described in clause (ii) will imminently exceed 7 percent of the volume of all such merchandise imported into the United States. The Commission shall consider such imports only for purposes of determining threat of material injury.

Obviously, timing is an element of this statute, as it is of this action, the commencement of which, to this court's knowledge, has not impeded the administrative process ordained by Congress and summarized by the court of appeals in *American Lamb,* 785 F.2d at 998–99. In their reply brief, the plaintiffs predicted that the ITA would modify the scope of this case in response to their request therefor, and that prediction has proven prescient *sub nom.* Dep't of Commerce, *Notice of Preliminary Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Germany,* 67 Fed.Reg. 17,384 (April 10, 2002). According to this notice, the petitioners

> requested the scope of the investigation be amended to exclude high carbon, high tensile 1080 grade tire cord and tire bead quality wire

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[18] This statutory subsection sets forth exceptions to the prescribed Commission cumulation for determining material injury.

> rod actually used in the production of tire cord and tire bead, as defined by specific dimensional characteristics and specifications[19,]

which seemingly has been granted. *See generally* 67 Fed.Reg. at 17,385 (Scope of the Investigation).

The ITC record currently before this court reflects that, based upon official Commerce Department statistics, imports of subject merchandise from Germany constituted 3.1 percent of the total of all such imports for the period August 2000 to July 2001. *See* USITC Pub. 3456, p. IV–7. But that percentage was computed before the ITA decided to modify the scope of the investigation, and the plaintiffs have taken the position from the beginning that any such amendment would reduce the German percentage to less than three and thereby require aggregation of that country's then-negligible number with those of other lands similarly situated, in particular, Egypt, South Africa and Venezuela, the percentages for which have been listed as 1.4, 2.6, and 2.1[20], respectively, in a table to the ITC staff report.

The court has no way of finally resolving now this circumstance. It cannot completely overlook this development in regular course, given the nature of plaintiffs' claims and defendant's stated recognition herein that it "must defer to Commerce's definition of the scope of investigation."[21] The court also cannot overlook the 1994 Statement of Administrative Action that advised of an intent to preclude termination of a preliminary investigation when, for example,

> imports are extremely close to the relevant quantitative thresholds and there is a reasonable indication that data obtained in a final investigation will establish that imports exceed the quantitative thresholds.

H.R. Doc. No. 103–316, vol. 1, p. 857. It cannot find that the 3.1 percent attributed to Germany is not now "extremely close" to the "less than 3 percent of the volume of all such merchandise imported into the United States" specified in the statute quoted above, 19 U.S.C. §1677(24)(A)(i).[22] Finally, if, as the court of appeals has affirmed in *American Lamb, supra,* the

> ITC has consistently viewed the statutory "reasonable indication" standard as one requiring that it issue a negative determination * * * only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a

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[19] 67 Fed.Reg. at 17,384. *See supra* n. 14.

[20] *See* USITC Pub. 3456, p. IV–7. The court notes in passing that the next-higher percentage to these three and to that listed for Germany is the 3.8 set forth for Indonesia.

[21] While the response brief on behalf of intervenor-defendant Siderurgica del Orinoco, C.A. ("Sidor") takes the position (at pages 25–26) that the ITC has authority to determine the "domestic like product" and is not circumscribed by the ITA's scope of investigation, the court does not accept intervenor-defendant's resultant contention that "an amendment to the Department's scope has no necessary bearing on the Commission's negligibility analysis". Sidor Response Brief, p. 23. *Compare* Plaintiffs' Reply Brief, p. 15.

Independent of this argument, Sidor does note, as it must, that "[m]any aspects of an investigation * * * can change, and indeed do change". Sidor Response Brief, p. 17, n. 16.

[22] That part of the record emphasized by the plaintiffs (and reproduced as Confidential Appendix 10 to their Rule 56.2 motion) reflects a 2.91 percent ratio for imports from Germany, albeit for the petition period July 2000 to June 2001.

> final investigation * * * [and as] involving a process of weighing the evidence but under guidelines requiring clear and convincing evidence of "*no* reasonable indication", and no likelihood of later contrary evidence,[23]

this standard does not now sustain the Commission's termination of its preliminary investigation of imports of carbon and certain alloy steel wire rod from Egypt, South Africa and Venezuela that are alleged to be sold in the United States at less than fair value.

III

Hence, this action must be, and it hereby is, remanded to the International Trade Commission for reconsideration of the aforesaid termination, given the ITA's above-cited amendment of the scope of investigation. The defendant may have until August 2, 2002 for such reconsideration and to report the results thereof to the other parties and to the court, whereupon any party may serve and file written comments thereon by August 12, 2002.

So ordered.

[23] 785 F.2d at 1001 (emphasis in original).